SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 299

THE UNITED STATES, PETITIONER

vs.

GERLACH LIVE STOCK COMPANY

No. 300

THE UNITED STATES, PETITIONER

vs.

J. SHELDON POTTER

No. 301

THE UNITED STATES, PETITIONER

vs.

MARTIN ERRECA

No. 302

THE UNITED STATES, PETITIONER

vs.

JAMES J. STEVINSON (a Corporation)

No. 303

THE UNITED STATES, PETITIONER

vs.

ARCHIBALD J. STEVINSON

No. 304

THE UNITED STATES, PETITIONER

vs.

3-H SECURITIES COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 46009

GERLACH LIVE STOCK COMPANY (a corporation),
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Petition in No. 46009—Filed October 30, 1943.

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named alleges and shows to the court:

I.

2 On and prior to the 20th day of June, 1935, Miller & Lux Incorporated, a corporation, was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

All of Section 16; north half, and north half of southeast quarter of Section 21; north half, north half of south half, and southeast quarter of southeast quarter of Section 22; east half of northeast quarter of Section 27; east half of northeast quarter of Section 27; all in Township 8 South, Range 11 East, M. D. B. & M., containing 1640 acres.

II.

On said 20th day of June, 1935, said Miller & Lux Incorporated duly conveyed said land to one Edward P. Waltz, subject to certain "exceptions and reservations" hereinafter set forth, and he remained the owner of said land together with the tenements, hereditaments, and appurtenances thereunto belonging, until the 25th day of February, 1937, on which day he conveyed the same to Gerlach Live Stock Company, a corporation, and it remained the owner of said property, together with the tenements, hereditaments and appurtenances thereunto belonging, except for the taking by defendant as hereinafter

alleged, until the 9th day of May, 1942, when it duly conveyed the same to one C. A. Crane.

III.

Said C. A. Crane remained the owner of said property together with the tenements, hereditaments and appurtenances thereunto belonging, except for the taking by defendant as hereinafter alleged, until May 14, 1942, when he conveyed the same to Strathearn Bros., a co-partnership composed of R. P. Strathearn, J. L. Strathearn, George P. Strathearn and David L. Strathearn, and they ever since have been the owners of said property together with its tenements, hereditaments and appurtenances, except for the said taking by defendant.

IV.

The San Joaquin is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota", and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

V.

All of said lands lie along and border upon branch channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and its successors are, but for the taking by defendant hereinafter alleged, entitled to all rights of riparian owners with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon, subject only to the "reservations and exceptions" hereinafter set forth.

VI.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the

other leading south from said reservior through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VII.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River
5 had been either appropriated by other persons, or used by riparian owners on said river for the irrigation of pasture lands, between the location of Friant Dam and the lands of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said water by the defendant by means of its said reservoir and canals at Friant. The use and appropriation of said water of the San Joaquin River by the various persons so using and appropriating the same above lands of plaintiff resulted in said water flowing to the lands of plaintiff when not used by such appropriators or users and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and the branch channels thereof above the lands of plaintiff; and the removal of said water from the lands upon which such water had theretofore been appropriated and used was detrimental to plaintiff's land and water rights.

VIII.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said lands of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river
6 situated above said lands of plaintiff, and said water from time immemorial had flowed down said river and through said branch channels of said river and by,

through, over and upon said land of plaintiff and would naturally continue to so flow except for the taking by defendant, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said lands of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

IX.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

7

X.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which resulted to plaintiff and its lands and the compensation to which plaintiff is entitled by reason of the taking aforesaid and has concluded and found that the said lands and water rights have been damaged in the sum of $14,760.00 by the said taking, and plaintiff alleges that in fact the said rights which plaintiff owned in the said lands on said 20th day of October, 1941, have been damaged in said sum of $14,760.00 by the taking aforesaid as against the rights of plaintiff in said lands, and said sum together with a sum equal to interest thereon from the date of taking to date of payment at 7 per cent per annum constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

XI.

The defendant has not paid said sum or any part thereof. The said payment has not been made for the following reasons:

Said deed from Miller & Lux Incorporated dated June 20, 1935, contained the following provision referred to therein as "exceptions or reservations":

"This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary and affiliated companies (including mutual water companies in which the grantor owns stock), whether such water rights be riparian, appropriative or prescriptive, to the end that the grantor, its successors, subsidiary and affiliated companies, may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hinderance from the grantee, his heirs and assigns. This covenant and condition shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary and affiliated companies, against the grantee, his heirs and assigns to the extent herein provided."

At the time of making said deed Miller & Lux Incorporated was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River, and it also theretofore stored and impounded said waters behind dams across the said river and its branch channels, and other persons had with the consent of said Miller & Lux Incorporated stored portions of the waters of said river in the Sierra Nevada Mountains for hydro-electric power and returned the same to the river channel far above the lands of Miller & Lux Incorporated; and the true meaning of said reservation or exception was that said Miller & Lux Incorporated reserved the rights which it then had to store, impound, divert and use all or any part of the water flowing in the San Joaquin River and its tributaries for use on the land so owned by it, and to continue to permit such storage for power purposes. At that time said Miller & Lux Incorporated was subdividing its land for sale in small parcels and intended to provide for the future irrigation of said land with the rights which it or its subsidiary and affiliated companies, including mutual water companies, then owned or to which it might assign said rights, and for that reason and purpose it likewise reserved the right to so assign said rights to any such subsidiary or affiliated

companies, including mutual water companies, and the right of its assignees to continue to exercise such rights. At the time of making said deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of the plaintiff and also had made certain appropriations of water of the river on lands situated above the lands of the plaintiff, but it owned no right to store any water of said river at Friant, nor did it own any right to store any water of said river elsewhere, except so far as it had theretofore stored and impounded said water behind dams on its lands, or permitted such storage for power purposes, nor did it own any right to appropriate or divert any of the water of the San Joaquin River at Friant or to store the same in the said Friant Reservoir or to divert the same into either of the two canals so to be constructed by the defendant, nor did it own any right to transfer or change the place of diversion or use of the waters which it had theretofore diverted and used to the said Friant Reservoir or the canals leading therefrom, so as to interfere with the flow of said water to plaintiff's lands when not used by said Miller & Lux Incorporated or with the return thereof to the lands of plaintiff when so used, nor did it own any right to transfer or change the place of diversion or use of the water which had theretofore been used by others from the said San Joaquin River on lands above the lands of plaintiff so as to store the same in the said Friant Reservoir and so as to divert the same therefrom, and thus prevent the same from flowing or returning to the lands of the plaintiff, nor did it have any right in or to the surplus water of said river over and above the water theretofore appropriated by it or used and reasonably necessary for use on its lands, and none of said rights was conveyed by the plaintiff or its predecessors to the said Miller & Lux Incorporated, nor was any of said rights by said deed made an easement in said land or reserved or excepted from the rights of plaintiff in said land, nor did the said Miller & Lux Incorporated thereby acquire or own a right to all of the water of the San Joaquin River or a right to prevent the plaintiff from using said water on its riparian lands, and the said exceptions and reservations in no way authorized said Miller & Lux Incorporated to burden the said land by any taking of water by defendant, and the damages so inflicted upon said lands and upon plaintiff were inflicted by reason of interference with rights owned by the said plaintiff, notwithstanding said reservations and exceptions.

XII.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation,
11 was uncertain as to whether said compensation should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said compensation in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment should be recovered by plaintiff in the Court of Claims of the United States for damages or compensation for such taking. Plaintiff has endeavored to settle and adjust its claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XIII.

Thereafter and on the 18th day of March, 1943, said Gerlach Live Stock Company, a corporation, sold, assigned, transferred, and set over to said Strathearn Bros. its claim, demand, right and cause of action against the United States of America for compensation for the taking, as hereinafter alleged, by defendant through the Bureau of Reclamation, Department of the Interior of the United States of America, of the waters of the San Joaquin River for storage in and diversion at Friant Dam as against the right of said Gerlach Live Stock Company as the owner of said land. The consideration for said transfer was the payment of the sum of Ten Dollars ($10) by Strathearn Bros. to said Gerlach Live Stock Company for said claim.

There has been no assignment or transfer of the
12 claim herein or any part thereof other than the transfer herein set forth. The said plaintiff brings this action for the use and benefit of said Strathearn Bros., assignees.

XIV.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets for the use and benefit of said Strathearn Bros.

XV.

The plaintiff herein and all other owners of the claim made herein have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and plaintiff believes the facts as stated in this petition to be true.

XVI.

The following Acts of Congress and Acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000.00 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L. pp. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597) entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which Act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,900,000.00 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L. pp. 564-597) entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000.00 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L. pp. 844-850) entitled "An Act authorizing the construction, repair and preservation of certain public works

on rivers and harbors, and for other purposes", which act appropriated $12,000,000.00 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U.S.S.A.L. p. 291) which act appropriated $9,000,000.00 to the Central Valley Project.

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L. pp. 685-719) which act, at page 719, appropriated $10,000,000.00 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000.00 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U. S. S.A.L. pp. 406, 438), appropriating $23,000,000.00 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S. S.A.L. p. 1200), reauthorizing the Project.

15 14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L. p. 336), appropriating $34,750,000.00 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S.S.A.L. p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embraced in the Project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000.00 for the Project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the Project.

WHEREFORE, plaintiff prays that plaintiff, for the use and benefit of said Strathearn Bros., recover judgment against said defendant for the sum of $14,760.00, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California, October 18, 1943.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

16 *Duly sworn to by Louis G. Baldwin.*
Jurat omitted in printing. (All in italics.)

17 *Proceedings following petition in case No. 46009*

On December 9, 1943, a general traverse was filed to the petition in case No. 46009.

On February 17, 1944, on motion made therefor and allowed by the court, the general traverse was withdrawn and defendant's demurrer to petition was filed.

On April 3, 1944, the case was argued and submitted on defendant's demurrer to petition.

On October 2, 1944, defendant's demurrer was overruled, with opinion by Judge Whitaker.

On November 11, 1944, a general traverse was filed which is as follows:

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

P. M. C.
N. A. C.
E. E. E.

19 *Intervening Petition of Miller & Lux Incorporated—Filed February 12, 1945*

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 13th day of December, 1944, and states:

20 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madero, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto, and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture

lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that
21 the lands described in paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcel comprising said lands bordered upon a slough which took out of the San Joaquin River, and none of said lands bordered upon said river.

II.

The commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the Southern California Edison Company and the San Joaquin Light and Power Company, and/or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, exce[illegible] the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener
22 commenced negotiations for the sale of its said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential in selling price was maintained by intervener as to said two
23 classifications of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to Ed. P. Waltz on the 12th day of April, 1927, under a ten-year installment contract, which contained, among other things, the following exception and reservation:

"*The following property and property rights are* excepted and reserved, to wit:

"All water rights, if any, whether riparian, appropriative or prescriptive, including the right to receive water released from storage reservoirs on the San Joaquin River."

That a similar exception and reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands; that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said Ed. P. Waltz and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land; that at the time of said sale it was the opinion of counsel for intervener, as well as the opinion of many other lawyers specializing in water law, that an exception and reservation such as contained in said deed to Ed. P. Waltz created a waiver or estoppel as between grantor and grantee, and their successors
24 and assigns, but did not affect the riparian rights of the land so conveyed in so far as third parties not in privity with the grantor were concerned; that subsequent to said sale to Ed. P. Waltz, to wit, in the year 1932, the Superior Court of the State of California, in and for the

County of Fresno, in that certain action entitled Miller & Lux Incorporated v. Madera Irrigation District, held that such an exception and reservation, if carried into a deed, would completely extinguish the riparian right of the land so conveyed, and to avoid such a result, which was never intended by intervener, and to permit the use of water on said land so conveyed, as against all parties other than intervener, its successors and assigns, intervener in its aforesaid deed to Ed. P. Waltz, executed on June 20, 1935 upon completion of all payments due under his contract, substituted for the exception and reservation clause which appeared in the contract, and which is above quoted, the clause quoted in paragraph XI of plaintiff's petition herein; and it was provided in the reservation so used in said deed that intervener and its subsidiary and affiliated companies "may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs and assigns", and the effect of this language was and it was intended to be to entirely deprive said lands so conveyed of any water rights whatsoever, or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns.

25

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove referred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was

nexed to said contract, marked Exhibit "B", a map show-
g the grass lands and riparian lands affected by said con-
act, which included the lands referred to in plaintiff's peti-
n herein, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; PROVIDED, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally each and every allegation of plaintiff's petition, and alleges that the land referred to in
28 plaintiff's petition has not been and will not be damaged in the sum of $14,760.00, or any other sum, by reason of said storage of water.

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

WHEREFORE, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
January 29, 1945.

J. E. WOOLLEY,
Attorney for Intervener.

29 *Duly sworn to by F. L. Humphrey.*
Jurat omitted in printing. (All in italics.)

31 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated—Filed March 12, 1945*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph IV of said petition, it denies all of the allegations thereof except that it admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but

32 denies that by any means it offered its lands to the public in two general classifications, lands with water rights, and lands without water rights, but on the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and it denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but it alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

II.

Answering Paragraph V of said petition, plaintiff denies that the exception contained in the said contract with Ed. P. Waltz, dated the 12th of April, 1927, was made for the sole purpose of depriving said land of any water rights as between intervener and its successors and assigns

33 and Ed. P. Waltz, and on the contrary alleges that the effect of the said reservation was to except all water rights, and it denies that the said deed contained a different reservation in order to permit the use of water on said land as against all parties other than intervener, its successors and assigns, but on the contrary that the purpose of said change was to permit the owner of said land to use any water thereon, both against the intervener and any other person, other than the water expressly reserved thereby, and it denies that the effect of the language there used was or was intended to be to entirely deprive said land so conveyed of any water rights whatsoever or any rights in and to the waters of said River of any nature or kind, as against intervener, its successors and assigns, and on the contrary plaintiff alleges that the effect of the said reservation was as stated in the petition of plaintiff herein.

III.

Answering Paragraph VII of said petition, plaintiff denies that it is not entitled to use on the lands described

in said petition any water which the United States of America, pursuant to the contract or deed mentioned therein, or otherwise, has stored or diverted, or any water which said United States hereafter proposes to store and divert, and on the contrary it alleges that it is entitled to use on said lands a reasonable quantity of the waters of said River which are set forth and described in its petition herein.

34 IV.

It denies all of the allegations of Paragraph VIII of said petition.

V.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of plaintiff and in law enures to its benefit to the extent provided by said agreement creating said escrow.

WHEREFORE, plaintiff prays that intervener take nothing by its intervention, and that plaintiff recover judgment as prayed for in its petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to it herein from the escrow referred to in said intervention to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

35 State of California
City and County of San Francisco.—ss.

Edward F. Treadwell, being first duly sworn, deposes and says: That he is the attorney for plaintiff in the above entitled action and makes this verification on its behalf; that he has read the foregoing answer and knows the contents thereof; that the facts therein stated are true to the best of his knowledge and belief; that the sources of his knowledge and belief are that he personally knows the truth as to all of the facts alleged in the intervening petition and in the answer thereto.

EDWARD F. TREADWELL.

Subscribed and sworn to before me this 7th day of March, 1945.

(Seal) LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

37 In the Court of Claims of the United States

No. 46244

MARTIN ERRECA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Petition in No. 46244—Filed October 26, 1944

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the court:

I.

By a certain deed in writing dated October 20, 1937, Miller & Lux Incorporated, a corporation, which was then the owner of the land hereafter described, conveyed to plaintiff subject to certain "exceptions and reservations" 38 hereinafter set forth, all that certain lot, piece and parcel of land, situate, lying and being in the County of Merced, State of California, and more particularly described as follows:

Beginning at the Southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., thence North 89° 25' East 765.60 feet to the northeast corner of Swamp and Overflow Survey 136 in aforesaid Township and Range, thence along the east line of Swamp and Overflow Survey 136 South 2701.60 feet, thence down and along the right bank of the San Joaquin River South 43° 16' West 115.60 feet, South 25° 02' West 322.00 feet, South 43° 51' West 246.00 feet, South 58° 34' West 370.00 feet, South 66° 26' West 479.35 feet, South 56° 36' West 150.00 feet, South 36° 42' West 645.00 feet, South 43° 45' West 405.00 feet, South 31° 14' West 180.00 feet, South 53° 59' West 55.00 feet, North 85° 24' West 90.00 feet, North 59° 54' West 206.00 feet and North 32° 58' West 219.00 feet, thence leaving river and running along the southerly right of way line of County Road North 41° 56' East 349.75 feet, thence along the arc of a curve to the right of radius 2262.00 feet, a distance of 325.70 feet, thence North 50° 11' East 1658.28 feet, thence leaving road North 1° 07' West 2871.50 feet to the point of beginning, excepting therefrom a portion of a sixty foot County Road, the center line of said portion of County Road being described as follows: Beginning at

a point which bears South 1° 07′ East 2833.06 feet from the southwest corner of aforesaid Swamp and Overflow Survey 300, thence North 50° 11′ East 924.72 feet to the east line of aforesaid Swamp and Overflow Survey 136. Total acreage, exclusive of exception, 71.85 acres, more or less.

39

II.

At all times thereafter said Martin Erreca was the owner of said land and has at all said times been in the possession and entitled to the possession of said land.

III.

The San Joaquin River is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota" and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

All of said land lies along and borders upon channels of the said San Joaquin River and is riparian thereto, and the owner of said land, subject to said "exceptions and reservations", was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of a riparian owner with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon.

V.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department
40 of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading from said reservoir south through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or taking, and the storage, diversion and use by the United States of America through the said Bureau

of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the land of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River had been either appropriated by other persons, or used by riparian owners on said river for the irrigation of pasture lands, between the location of Friant Reservoir and the land of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of
41 such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said water by the defendant by means of its said reservoir and canals at Friant. The use and appropriation of said water of the San Joaquin River by the various persons so using and appropriating the same above the lands of plaintiff resulted in said water flowing to the lands of plaintiff when not used by such appropriators and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and said channels thereof above the land of plaintiff, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of plaintiff or said land of plaintiff in and to said waters, and in and to the use thereof by the defendant by means of its said reservoir and canals at Friant.

VII.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said land of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river situated above said land of plaintiff, and said water from time immemorial had flowed down said river and through said channels of said river and by, through, over and upon said land of
42 plaintiff and would naturally continue to so flow except for the taking by defendant, and the plans of said

defendant contemplated acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VIII.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevent the same from flowing by, through, over and upon the land of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

IX.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which has resulted to plaintiff and his lands by reason of the
43 taking aforesaid and has concluded and found that the said lands have been damaged in the sum of $646.65 by the said taking, and plaintiff alleges that in fact the said rights of plaintiff in the said land and in the waters of the San Joaquin River have been damaged in the sum of $2874.00 by the taking aforesaid as against the rights of plaintiff in said land and water and said sum together with an amount equal to interest thereon from the date of taking to the date of payment at seven per cent (7%) per annum constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

X.

The defendant has not paid said sum or any part thereof. The said payment has not been made for the following reasons:

Said deed dated October 20, 1937, contained the following provision referred to therein as "Exceptions or reservations":

"This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative or prescriptive, to the end that the Grantor, its successors, subsidiary and affiliated companies, may use, enjoy and transfer said water rights, including the right to con-
44 tract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary and affiliated companies, against the Grantee, his heirs and assigns, to the extent herein provided."

At the time of the execution and delivery of said deed, Miller & Lux Inc. was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries, which it had theretofore irrigated with the waters of the San Joaquin River either personally or through subsidiaries and affiliated companies, including mutual water companies in which it owned stock, and it had also entered into certain contracts with other persons under which it consented that certain portions of the waters of the said River might be stored on the upper reaches of said River and used for hydroelectric power and returned to the river channel far above the lands of Miller & Lux Inc., and the true meaning of said reservation and exception was that said Miller & Lux Inc. reserved the water rights which it then owned, including the right to continue said storage on the upper reaches of said River. At the time of making said deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of the plaintiff and also had made certain appropriations of water of the river on lands situated above the lands
45 of the plaintiff, but it owned no right to store any water of said river at Friant, nor did it own any right to store any water of said river elsewhere, except so far as it had theretofore permitted said storage for power purposes, nor did it own any right to appropriate or divert any of the water of the San Joaquin River at Friant or to store the same in the said Friant Reservoir or to divert the same into either of the two canals so to be constructed by the defendant, nor did it own any right to transfer the

waters which it had theretofore diverted and used to the said Friant Reservoir or the canals leading therefrom, so as to interfere with the flow of said water to plaintiff when not used by said Miller & Lux Incorporated or with the return thereof to the lands of plaintiff when so used, nor did it own any right to transfer or change the place of diversion or use of the waters which had thertofore been used by others from the said San Joaquin River on lands above the lands of plaintiff so as to store the same in the said Friant Reservoir and so as to divert the same therefrom, and thus prevent the same from flowing or returning to the lands of the plaintiff, nor did it have any right to transfer or change the place of diversion or use of the surplus water of said river over and above the water theretofore appropriated by it or used and reasonably necessary for use on its lands, and none of said rights was conveyed by the plaintiff to the said Miller & Lux Incorporated, nor was any of said rights by said deed made easements in said land or reserved or excepted from the rights of plaintiff in said land, nor did the said Miller & Lux Incorporated thereby acquire or own a right to all of the water of the San Joaquin River or a right to
46 prevent the plaintiff from using said water on his riparian lands, and the said exceptions and reservations in no way authorized said Miller & Lux Incorporated to burden the land by any taking of water by defendant, and the damages so inflicted upon said lands and upon plaintiff were inflicted by reason of interference by defendant with rights owned by the said plaintiff, notwithstanding said reservations and exceptions.

XI.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation, was uncertain as to whether said damages should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said damages in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment should be recovered by plaintiff in the Court of Claims of the United States for damages or compensation for said taking. Plaintiff has endeavored to settle and adjust his claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XII.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

47 XIII.

The plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government and plaintiff believes the facts as stated in this petiton are true.

XIV.

The following acts of Congress and acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of Federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000 to the project.

4. The act of Congress approved August 30, 1935 (49 U.S.S.A.L. p. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of
48 certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which act, at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project", appropriated $6,900,000 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L. pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000 was appropriated for the Central Valley

Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L. pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000 to the Central Valley Project.

49 9. The Act of Congress of May 9, 1938 (52 U.S. S.A.L. p. 291), which act appropriated $9,000,000 to the Central Valley Project.

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L. pp. 685-719), which act, at page 719, appropriated $10,000,000 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L. pp. 406, 438), appropriating $23,000,000 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S. S.A.L. p. 1200), authorizing the project.

14. The Act of Congress of June 28, 1941 (55 U.S. S.A.L. p. 336), appropriating $34,750,000 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S. S.A.L. p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embodied in project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000 for the project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the project.

WHEREFORE, plaintiff prays that said plaintiff recover judgment against said defendant for the sum

50 of $2874.00, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and for costs of suit.

Dated, San Francisco, California.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

51 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics).

53 *General Traverse in Case No. 46244—Filed December 5, 1944*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

P. M. C.
N. A. C.
E. E. E.

55 *Intervening Petition of Miller & Lux Incorporated*

Filed March 5, 1945

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 10th day of January, 1945, and states:

56 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madera, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto, and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and

are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that the lands described in
57 paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcel comprising said lands bordered upon a slough which took out of the San Joaquin River, and none of said lands bordered upon said river.

II.

That commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the Southern California Edison Company and the San Joaquin Light and Power Company, and/or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, except the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener commenced negotiations for the sale of its
58 said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential in selling price was maintained by intervener as to said two classifications
59 of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to plaintiff on the 22nd day of February, 1934, under a ten-year installment contract, which contained, among other things, the following exception and reservation:

"The following property and property rights are excepted and reserved, to-wit:

"All water rights, if any, whether riparian, appropriative or prescriptive, including the right to receive water released from storage reservoirs on the San Joaquin River."

That a similar exception and reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands; that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said plaintiff and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land; that at the time of said sale it was the opinion of counsel for intervener, as well as the opinion of many other lawyers specializing in water law, that an exception and reservation such as contained in said contract with plaintiff created a waiver or estoppel as between grantor and grantee, and their successors and assigns, but did not affect the
59a riparian rights of the land so conveyed in so far as third parties not in privity with the grantor were concerned; that at about the time of said sale of plaintiff

one of the Superior Courts of the State of California held that such an exception and reservation, if carried into a deed, would completely extinguish the riparian right of the land so conveyed, and to avoid such a result, which was never intended by intervener, and to permit the use of water on said land so conveyed, as against all parties other than intervener, its successors and assigns, intervener in its deed to plaintiff, executed on the 20th day of October, 1937, upon completion of all payments due under his contract, substituted for the exception and reservation clause which appeared in the contract, and which is above quoted, the clause quoted in paragraph X of plaintiff's petition herein; and it was provided in the reservation so used in said deed that intervener and its subsidiary and affiliated companies "may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs and assigns", and the effect of this language was and it was intended to be to entirely deprive said lands so conveyed of any water rights whatsoever, or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns.

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove re-
60 ferred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was annexed to said contract, marked Exhibit "B", a map

showing the grass lands and riparian lands affected by said contract, which included the lands referred to in plaintiff's petition herein, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said
60a waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; PROVIDED, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payments therefor made as
61 herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally each and every allegation of plaintiff's petition, and alleges that the land referred to in plaintiff's petition has not been and will not be damaged in the sum of $2,874.00, or any other sum, by reason of said storage of water.

62

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, betted, or given encouragement to rebellion against the said Government.

Wherefore, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
February 26, 1945.

J. E. Woolley,
Attorney for Intervener.

63 *Duly sworn to by F. L. Humphrey,*
Jurat omitted in printing. (All in italics).

65 *Appearance of Southern California Edison Company Ltd. in Response to Notice Under Section 14 (b) of Public Law No. 395.*

Filed March 7, 1945

To the Honorable, the Court of Claims of the United States:

Comes now Southern California Edison Company Ltd., a corporation, in response to notice pursuant to an order made by this Honorable Court on January 10, 1945, to appear in the above-entitled suit to assert and defend any interest it may have in said suit, and alleges:

I.

The action is one brought by the plaintiff, Martin Erreca, to recover from the defendant, United States of America, compensation for the alleged taking by the United States in the State of California,

of riparian rights to the waters of the San Joaquin
66 River in the State of California, appertaining to the lands described in the petition herein, which riparian rights and lands plaintiff alleges he owned at the time of the taking by the United States. The compensation for the said taking by the United States claimed by the plaintiff from the defendant by said petition is the sum of $2,874, together with interest at 7 per cent per annum from October 20, 1941 until paid, and said moneys are the subject matter of the action.

II.

Southern California Edison Company Ltd., herein called "Edison Company", is a corporation organized and existing under the laws of the State of California, engaged in the public utility business of generating, transmitting and distributing electric energy in the State of California.

While Miller & Lux Incorporated was the owner of the said lands described in said petition, the Edison Company, or its predecessors, entered into contracts, in writing, with said Miller & Lux Incorporated, whereby Miller & Lux Incorporated, as the owner of said lands described in said petition, and of other large areas of land in the San Joaquin Valley, and of water rights appertaining to said lands or acquired by appropriation, granted to Edison Company, its predecessors and grantors, rights to divert, store and use the waters of the said San Joaquin River and its tributaries for power purposes, the diversion, storage and use of said waters to be at various points in the mountains, many miles upstream from the location of the Friant Dam referred to in said petition. In addition, said contracts

provided for the use of waters for domestic and other
67 purposes incidental to the generation of said power.

The first of said contracts was that dated August 17, 1906, between Miller & Lux Incorporated and Las Animas and San Joaquin Land Company, Incorporated, parties of the first part, and John S. Eastwood, William G. Kerckhoff, A. C. Balch, H. E. Huntington, and Mammoth Power Company, parties of the second part. Thereafter, thirteen contracts, supplemental to said contract dated August 17, 1906, were entered into. All of said supplemental contracts were entered into prior to October 20, 1937.

the date upon which plaintiff alleges he acquired title from Miller & Lux Incorporated to the lands described in said petition.

The Edison Company now owns all of the rights granted by said contract dated August 17, 1906, as supplemented, and the said alleged water rights of the plaintiff at the time of the taking by the United States were and are subject thereto.

The rights of Edison Company under said contract to the diversion, use and storage of the waters of the San Joaquin River above the lands of plaintiff are admitted by said petition.

III.

The rights of the Edison Company to divert, store and use the waters of the San Joaquin River and its tributaries above the lands of the plaintiff are no part of the rights of the plaintiff alleged to have been taken by the United States and for which the plaintiff claims compensation. The said rights of the Edison Company do not constitute any part of those rights alleged to belong to the plaintiff, and for which plaintiff seeks to recover compensation against the United States. The United States has not taken, nor
68 does it propose to take, rights of the Edison Company in and to the waters of the said San Joaquin River and its tributaries. The said rights of Edison Company to the waters of the San Joaquin River and its tributaries as against the said lands alleged to be owned by the plaintiff now exist and will continue to exist after the alleged taking by the United States of the remaining water rights of the plaintiff.

IV.

The Edison Company operates on the San Joaquin River and its tributaries five hydroelectric generating plants, installed and placed in operation between 1913 and 1929, with an aggregate operating capacity of approximately 400,000 kw. Certain of these plants are operated under permits granted by the Secretary of Agriculture under the Act of Congress of February 15, 1901, and others under the licenses issued under the Federal Water Power Act of June 10, 1920. To provide for the diversion and utilization of water through these plants the Edison Company maintains three storage reservoirs, with approximate capacity of 290,000 acre-feet, together with a series of tunnels and conduits extending many miles through the mountains. All of said works are located many miles upstream from the Friant Dam of the United States; and said Friant Dam is located many miles upstream from the lands of the plaintiff.

V.

One of said reservoirs, the Huntington Lake Reservoir, and Power Houses No. 1 and No. 2 were completed in 1913; the balance of the said works, including two reser-
69 voirs and three more power houses, were completed in 1928. Each year since the said works were completed Edison Company or its predecessors have, by means of said works, diverted, stored and used the waters of said San Joaquin River and its tributaries to the extent water was available for the generating of electrical energy at said power houses and certain purposes incidental thereto.

Edison Company alleges that it is the owner of the right to divert, store and use the waters of said San Joaquin River and its tributaries by means of said works for the said purposes, by virtue of (a) appropriations by Edison Company under and in accordance with the terms and provisions of the laws of the State of California, (b) the ownership by Edison Company of lands bordering upon and riparian to said streams, (c) the occupancy and use by Edison Company of lands of the United States riparian to said streams under licenses duly issued to it by the Federal Power Commission pursuant to the provisions of the Act of Congress, known as the Federal Power Act, (d) grants to and contracts with Edison Company by owners of lands riparian to the said San Joaquin River and by owners of appropriated rights to the waters of the said San Joaquin River, and (e) the open, notorious, continuous and adverse use by Edison Company of said waters under a claim of right for more than five years.

All of said water rights of Edison Company are prior to and superior to any right of the plaintiff in and to the waters of the San Joaquin River alleged to have been taken by the United States. The lands described in the said petition herein are subject to all of said rights of Edison Company; said rights are not involved in, and are not the subject matter of, this proceeding and constitute no part of the
70 property of the plaintiff alleged to have been taken by the United States and for which compensation is sought by the plaintiff in this proceeding.

VI.

All of the said water rights of Edison Company, including its rights under the said contracts with said Miller & Lux Incorporated, have been and hereafter will be exercised and enjoyed, and all of the waters of said river and its tributaries aforesaid so diverted, stored and used by Edison Company and its predecessors have been and will be

returned to the main channel of the river by Edison Company at points far above the said Friant Project, except as to certain small amounts of water used incidentally for domestic and other consumptive purposes. The diversion of the waters of said river by the United States by means of the said Friant Project, after the use of said waters by Edison Company and before said waters reach the lands of plaintiff, does not constitute a taking by the United States of any of the rights of Edison Company.

VII.

Edison Company, while claiming to own all of the rights aforesaid and not waiving the same, disclaims any interest in the compensation sought to be recovered by the plaintiff in this proceeding, which is compensation for the taking of certain alleged water rights of the plaintiff which it claims to own subject to the rights of Edison Company.

VIII.

Edison Company has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs I, II, IV, VII, VIII, IX, X, XI and
71 XII of said petition, and placing its denial upon such grounds denies each and every allegation therein contained except as herein specifically admitted or alleged.

IX.

Section 14(b) of Public Law 395 does not grant jurisdiction to the Court of Claims of the United States with respect to the property or other rights of the Southern California Edison Company Ltd. to the waters of the San Joaquin River and its tributaries, or in and to the lands described in the petition herein, or as to the property or other rights of the United States or any other party to this proceeding as against the Edison Company with respect to the use of the waters of said streams, and said Court of Claims is without jurisdiction to proceed in the above-entitled matter against the Edison Company. Said Section 14(b) of said Public Law 395 is applicable only to proceedings involving the termination of contracts, and the jurisdiction of the Court of Claims is not extended except with respect to that particular matter.

X.

Southern California Edison Company Ltd. has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said government.

WHEREFORE, Southern California Edison Company Ltd., respectfully prays that the Court of Claims order that
72 said Company be dismissed from these proceedings, and that the Court take no other action in these proceedings with respect to said Company.

Dated this 7th day of March, 1945.

Of Counsel:

GAIL C. LARKIN,
1113 Edison Bldg., 601 W. 5th St.,
Los Angeles 53, California.

PETER Q. NYCE,
1266 National Press Bldg.,
Washington 4, D. C.,
Attorney of Record for Southern California Edison Company Ltd.

Duly sworn to by Peter Q. Nyce.
Jurat omitted in printing. (All in italics).

73 *San Joaquin Light and Power Corporation's Plea to the Jurisdiction With Brief in Support Thereof.—Filed March 7, 1945.*

SAN JOAQUIN LIGHT AND POWER CORPORATION appears in the above entitled matter in response to the order made by the Honorable Court therein on January 10, 1945; avers that it was heretofore a corporation organized and existing under and by virtue of the laws of the State of California; that it was finally dissolved by order of the Superior Court of the State of California in and for the County of Fresno on the 21st day of December, 1944, having prior thereto conveyed and transferred all of its properties, both real and personal, to Pacific Gas and Electric Company, and that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided and abetted or given encouragment to rebellion against said Government.

74 San Joaquin Light and Power Corporation now and hereby moves the Honorable Court to revoke said order and to dismiss said corporation from said action on the ground that the Honorable Court did not have jurisdiction to make said order and does not have jurisdiction to make any order concerning said corporation for the following reasons, to wit:

1. San Joaquin Light and Power Corporation conveyed all of its properties and has been dissolved as above stated.

2. The cause stated in plaintiff's petition does not arise under Public Law 395 78th Congress, Chapter 358 2nd Session, and said court was not authorized by Section 14(b)

of said Public Law to order additional parties brought in except in cases arising under said Act or necessary to give effect to said Act. This case does not arise under said "Termination of Contracts Act".

3. Neither plaintiff's petition nor defendant's answer thereto shows any interest in or claim by San Joaquin Light and Power Corporation to the or any of the riparian rights of plaintiff or to any funds deposited in escrow by Miller & Lux Inc. Said petition shows that plaintiff owns riparian rights in waters of the San Joaquin River naturally flowing at the lands in the petition described subject to rights granted by Miller & Lux Inc. to San Joaquin Light and Power Corporation to store water above Friant Dam for the use of said corporation for power purposes and subsequent use by Miller & Lux Inc. and others, and such rights of San Joaquin Light and Power Corporation were not and are not included as the basis for any compensation claimed by plaintiff.

75 4. The storage and use by San Joaquin Light and Power Corporation all occurred above Friant Dam and could not and cannot be interfered with by the storage of water by said dam and San Joaquin Light and Power Corporation is not required to make any claim against the limited rights claimed by plaintiff or any claim against or interest in the fund deposited in escrow as alleged in his petition.

5. The respective rights of San Joaquin Light and Power Corporation and Miller & Lux Inc. and its subsidiaries and affiliated companies and their successors in interest were fully adjudicated and determined in an action brought in the Superior Court of the State of California in and for the County of Fresno in an action involved in an appeal to the District Court of Appeal of the State of California in and for the Fourth Appellate District (136 Cal. App. 495) and in a further appeal to the Supreme Court of California (8 Cal. (2d) 427), and this Honorable Court has no jurisdiction to review or retry the question of title to any such water or water rights involved in determining the matter of compensation to plaintiff pursuant to his said petition.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation,
1026 16th St., N. W.,
Washington 6, D. C.

Of Counsel:
ROBERT H. GERDES,
245 Market Street,
San Francisco 6,
California.

In his petition plaintiff expressly admits that the riparian rights for which he claims compensation have been reduced by the express exceptions and reservations contained in the grant to him by Miller & Lux Inc. Such exceptions and reservations include rights granted by said Miller & Lux Inc. to San Joaquin Light and Power Corporation to store waters of the San Joaquin River and use the same for power purposes above Friant dam, and neither petitioner nor any other party has challenged the said or any other rights of said San Joaquin Light and Power Corporation. All of the storage and uses of water of the San Joaquin River were made above Friant dam and San Joaquin Light and Power Corporation never claimed or had any rights whatsoever to use any of the waters of said river below said dam. The lands of plaintiff described in its petition are more than fifty miles downstream from Friant dam.

In his petition plaintiff only claims compensation for the taking of such riparian rights as he may presently have and does not show that San Joaquin Light and Power Corporation has ever made any claim to any share in any compensation which may be awarded to plaintiff against the defendant or that it is in any way interested in any amount thereof or would be in any way affected thereby. Neither the petition nor the answer of the defendant shows that San Joaquin Light and Power Corporation is making any claim to or has any interest in the money deposited in escrow by the defendant through the United States Bureau of Reclamation for the purpose of compensating owners of riparian lands situated along the San Joaquin River below said Friant dam.

77 The rights of the San Joaquin Light and Power Corporation to store water on the upper reaches of the San Joaquin River including its rights under the agreement with Miller & Lux Inc., referred to in the exceptions and reservations in plaintiff's deed from Miller & Lux Inc., was fully adjudicated and established in the case of *Miller & Lux Inc.* v. *San Joaquin Light and Power Corp.*, decided in 136 Cal. App. Rep. p. 495 and 8 Cal. Rep. (2) 427; and as against the plaintiff and all other owners of riparian lands who derive titles through Miller & Lux Inc., including Miller & Lux, by judgment of the Superior Court of the State of California, in and for Stanislaus County, in the case of *L. A. Vandervort* v. *San Joaquin Light and Power Corp., et al.*, No. 14642.

Even if this court had jurisdiction to require it, a matter we do not concede, it would be unjust and inequitable to

compel San Joaquin Light and Power Corporation to appear herein and to meet the burden and expense of proving its former rights to uses of water above Friant dam where it has no interest in the controversy, and benefit of its effort and expense would go solely to the defendant.

POINTS AND AUTHORITIES.

Said court did not have jurisdiction under Section 14(b) of Public Law 395—78th Congress, Chapter 358—2nd Session, to summon the San Joaquin Light and Power Corporation to assert and defend its rights to the use of the waters of the San Joaquin River as heretofore used and claimed to exist for the reason that the claim set forth in plaintiff's petition does not arise under said Public Law and is not necessary to give effect to said act.

78 Section 14(b) of said Public Law provides:

"(b) The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interest, if any, in such suit or proceeding, within such period of time prior to judgment as the Court of Claims shall prescribe. . . ."

Section 14(c) of said Public Law expressly limits such extended jurisdiction to matters arising under said Public Law. Section 14(c) of said Public Law provides:

"(c). The jurisdiction of the Court of Claims shall not be affected by this Act except to the extent necessary to give effect to this Act, and no person shall recover judgment on any claim, or on an interest on any claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted."

A careful reading of plaintiff's petition discloses that his claim, if any arises under the Fifth Amendment to the Constitution of the United States, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. Ed. 463; *Judicial Code*, Section 145, 28 *U.S.C.A.* Section 250.

The jurisdiction of the Court of Claims is confined to the rendition of money judgments against the United States. *United States* v. *Alire*, 6 Wall (U. S.) 573, 18 L. Ed. 947; *United States* v. *Jones*, 131 U. S. 1, 33 L. Ed. 90; *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1059.

While evidence of the extent of the water rights so excepted and reserved may become pertinent to the
79 determination of the amount of just compensation to be paid plaintiff for any taking of his present riparian rights, neither the petition of plaintiff nor the

answer of defendant shows that San Joaquin Light and Power Corporation claims any interest in the riparian rights now owned by plaintiff or in any fund deposited in escrow by defendant to compensate plaintiff for the taking of such rights. This court has no jurisdiction to compel San Joaquin Light and Power Corporation to litigate its water rights with the plaintiff in order that the defendant might more readily ascertain the value of the rights remaining in plaintiff and the compensation due to plaintiff for the taking of such rights.

In the case of *United States* v. *Sherwood*, *supra*, the court said:

> "If the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court."
>
> *United States* v. *Jones*, 131 U. S. 1, 33 L. Ed. 90.
>
> *Lynn* v. *United States*, 110 Fed. (2d) 586.

If plaintiff had sought to bring into this action the San Joaquin Light and Power Corporation in order to ascertain the extent of his rights, the Court of Claims would be without jurisdiction to try such case.

In the case of *United States* v. *Sherwood*, *supra*, the court said:

> If its maintenance against private parties is prerequisite to the suit against the United States the suit must be dismissed."
>
> *Turner* v. *United States*, 248 U. S. 354, 63 L. Ed. 291.
>
> *Pac. Mutual Life Ins. Co.* v. *United States*, 44 Fed. (2d) 887.

80 As the storage of water and the use of the same for power purposes by the San Joaquin Light and Power Corporation cannot be interfered with by the storage of water in Friant dam, and Miller & Lux Incorporated could not, even if it had assumed so to do, convey to the defendant the rights theretofore granted to said San Joaquin Light and Power Corporation, there is nothing before the court to indicate that said company has any interest in said fund or any compensation to be paid to the plaintiff for the taking of his riparian rights. The situation is quite unlike that appearing in *Intermingled Cotton cases*, 92 U. S. 654, where each owner of cotton in the pool had an interest in the common fund derived from the sale of the same.

> *Miller & Lux, Inc.* v. *San Joaquin Lt. & Power Corp.*, 136 Cay. App. 495.
>
> *Miller & Lux, Inc.* v. *San Joaquin Lt. & Power Corp.*, 8 Cal. (2d) 427.

For the reasons hereinabove stated it is respectfully submitted that the order of said court made on the 10th day of January 1945 should be revoked, and the San Joaquin Light and Power Corporation should be dismissed from said action.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation.

Of Counsel:
ROBERT H. GERDES,
245 Market Street,
San Francisco 6,
California.

81 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated.—Filed March 28, 1948.*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph I of said intervening petition, plaintiff denies that the land described in Paragraph I of plaintiff's petition is not suitable for the growing of crops, and on the contrary alleges that all of said land is
82 suitable for the growing of crops, and denies that none of said lands border on the San Joaquin River.

II.

Answering Paragraph IV of said petition, plaintiff denies all of the allegations thereof except that he admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but denies that by any means it offered its lands to the public in two general classifications, lands with water rights, and lands without water rights, but on the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and he denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with

the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but he alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

83

III.

Answering Paragraph V of said intervening petition, plaintiff denies that a similar exception or reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands, and denies that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said plaintiff and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land, but on the contrary alleges that the real purpose of said provision was to reserve to said intervener the water rights which it owned on the other land, and the said deed dated October 20, 1937 was made to correctly set forth the actual intent of the parties, and plaintiff denies that the effect of the language of said deed was or was intended to entirely deprive said land so conveyed of any water rights whatsoever or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns, and on the contrary plaintiff alleges that the effect of said reservation was as stated in the petition of plaintiff herein.

IV.

Answering Paragraph VII of said petition, plaintiff denies that plaintiff is not entitled to use on the lands described in his said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

84

V.

Plaintiff denies all the allegations of Paragraph VIII of said petition.

VI.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of

plaintiff and in law inures to his benefit to the extent provided by said agreement creating said escrow

WHEREFORE, plaintiff prays that intervener take nothing by its intervention, and that plaintiff recover judgment as prayed for in his petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to him herein from the escrow referred to in said intervention, to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California.
March 20, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

85 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

87 IN THE

COURT OF CLAIMS OF THE UNITED STATES

No. 46245.

J. SHELDON POTTER, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46245—Filed Oct. 26, 1944.

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the court:

I.

At all times herein mentioned the plaintiff herein has been and now is, subject to the "conditions, covenants and reservations" hereinafter set forth, the owner in fee,
88 in the possession and entitled to the possession of all those certain lots, pieces and parcels of land, together with the appurtenances, situated in the County of Merced, State of California, and more particularly bounded and described as follows:

A. All of Swamp and Overflowed Land Surveys Nos. 297, 359, 307, 312, 311, 295, 296, 245, 294, 299, 313, 323, 324, 197, 196, 203, 202, 201.

B. All of the South half of Swamp and Overflowed Land Survey No. 298.

C. All of Swamp and Overflowed Land Survey No. 150 lying East of the Easterly line of the East Side Canal & Irrigation Co.'s East-Side Canal.

D. All that portion of Swamp and Overflowed Land Survey No. 361 described as follows:

Beginning at the northwest corner of the south half of the southwest quarter of Section 11, Township 9 South, Range 12 East, M. D. B. & M. (being portion of Swamp and Overflow Lot 361); thence due East 2639.05 feet to the northeast corner of said south half of the southwest quarter; thence north 0° 33½′ West 559.04 feet to the center line of a slough; thence along the center line of said slough the following courses and distances: North 72° 02½′ West 170.00 feet; North 0° 9′ East 675.00 feet; North 41° 15′ West 365.00 feet; North 27° 08′ West 355.00 feet; North 61° 03′ West 640.00 feet; North 18° 49′ West 290.00 feet; North 34° 01′ West 217.00 feet; thence leaving slough, South 89° 58½′ West 1294.60 feet to the West line of said Section 11; thence South along the west line of said Section and Swamp and Overflow Land Survey 361, 2640.00 feet to the point of beginning. Containing 133.25 acres, more or less.

89 *E.* All that portion of Swamp and Overflowed Land Survey No. 346, described as follows:

Beginning at the northwest corner of Section 13, Township 9, South Range 12 East, M. D. B. & M. (said Section 13 being Swamp and Overflow 346); thence south 5280.00 feet to the southwest corner of said Section 13; thence East 5278.65 feet to the southeast corner of said Section 13; thence North 285.00 feet to the center line of a slough; thence along the center line of said slough, the following courses and distances: North 55° 53½′ West 305.00 feet; North 33° 50′ West 175.00 feet; North 8° 48′ West 235.00 feet; North 29° 56′ West 225.00 feet; North 54° 26½′ West 305.00 feet; North 26° 05½′ West 205.00 feet; North 59° 41′ West 185.00 feet; North 6° 39′ East 140.00 feet; North 35° 30′ West 110.00 feet; North 20° 13½′ East 125.00 feet; North 54° 07½′ West 335.00 feet; North 18° 20½′ West 250.00 feet; North 46° 26½′ West 115.00 feet; North 13° 38½′ West 430.00 feet; North 5° 04½′ West 395.00 feet; North 62° 14½′ West 180.00 feet; North 2° 33′ East 280.00 feet; North 38° 46½′ East 230.00 feet; North 26° 20½′ East 205.00 feet; North 20° 20′ West 180.00 feet; North 60° 48½′ West 110.00 feet; North 87° 38½′ West 160.00 feet; North 50° 59′ West 175.00 feet; North 77° 47½′ West 320.00 feet; South

11° 20′ West 185.00 feet; North 81° 41½′ West 295.00 feet; North 61° 13½′ West 155.00 feet; North 84° 58½′ West 185.00 feet; North 64° 56½′ West 135.00 feet; North 2° 46′ West 155.00 feet; North 38° 07½′ West 315.00 feet; North 12° 27′ West 120.00 feet; South 86° 23½′ West 390.00 feet; South 70° 25½′ West 335.00 feet; North 38° 52½′ West 260.00 feet; North 27° 21′ West 185.00 feet; North 53° 51′ West 295.00 feet; North 5° 55½′ East 60.70 feet to the North line of said section and Swamp and Overflowed Land Survey No. 346; thence West 845.50 feet to the point of beginning containing 446.40 acres, more or less.

Reserving a thirty foot road easement along the north line of Survey 346, and along the north line of Survey 296, for use as a public road.

All being in Township 9 South, Range 12 East M. D. B. & M.

F. Location No. 3288, Swamp and Overflowed Lands in Sections 9 and 16, Township 9 South, Range 12 East, M. D. B. & M., described as follows:

Beginning at ¼ section corner between Sections 8 and 9, Township 9 South, Range 12 East, M.D.M., thence East 11.50 chains; thence South 72.90 chains to San Joaquin River, thence down stream North 77° West 3.71 chains; thence South 71¼° west 8.33 chains; thence North 74.75 chains to point of beginning, containing 84.08 acres, more or less.

Subject to:

Right of way for all presently existing roads, highways, telephone, telegraph and electric power and pipe lines, sewers, drainage ditches, canals and other drainage, reclamation and irrigation works, and the easement to maintain, operate and repair the same.

Said lands containing in the aggregate 6038.14 acres.

II.

The San Joaquin River is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota" and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

III.

All of said lands lie along and border upon channels of the said San Joaquin River and are riparian thereto, and

the plaintiff as the owner of said lands, subject to said "conditions, covenants and reservations", was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of a riparian owner with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon.

IV.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America formulated a project for the irrigation of the large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced,
92 Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading south from said reservoir though the counties of Fresno, Tulare, Kings, and Kern. Said plan contemplated the acquisition or taking and the storage, diversion and use by the United States of America through the said Bureau of Reclamation, of all the waters of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the lands of the plaintiff and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

V.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River had been either appropriated by other persons or used by riparian owners on said river (other than those mentioned in the "conditions, covenants and reservations" hereinafter set forth) for the irrigation of pasture lands, between the location of Friant Reservoir and the land of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said
93 water by the defendant by means of its said reservoir and canals at Friant. The use and appropria-

tion of said water of the San Joaquin River by the various persons so using and appropriating the same above the land of plaintiff resulted in said water flowing to the land of plaintiff when not used by such users and appropriators and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and branch channels thereof above the land of plaintiff, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of plaintiff and said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VI.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River, in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said land of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river situated above said land of plaintiff, and said water from time immemorial had flowed down said river and through said channels of said river and by, through, over and upon said land of plaintiff and would naturally continue to so flow except for the taking by defendant, and the
94 plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VII.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevent the same from flowing by, through, over and upon the land of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VIII.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which has resulted to plaintiff and his lands and the compensation to which plaintiff is entitled by reason of the taking aforesaid and has concluded and found that the said land has been damaged in the sum of $54,343.26 by the said taking, and plaintiff alleges that in fact the said rights of plaintiff in the said land and in the waters of the San Joaquin River have been damaged in the sum of $90,572.10 by the taking aforesaid as against the rights of plaintiff in said land and water, and said sum, together with a sum equal to interest thereon from the date of taking to the date of payment at seven per cent (7%) per annum, constitutes the reasonable value of the rights of the plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

IX.

The defendant has not paid said sums or any part thereof. The said payment has not been made for the following reasons:

The said plaintiff acquired said land together with its appurtenances from Miller & Lux Incorporated, a corporation, by deed dated Nov. 30, 1935, which deed contained the following "conditions, covenants and reservations":

(1) To all existing water rights of the Grantor and its subsidiary companies, to-wit: The San Joaquin & Kings River Canal & Irrigation Company, Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal Company, San Luis Canal Company and Santa Rita Irrigation Company, and whether established by appropriation, prescription or existing contract, and the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor.

(2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it or them, by appropriation or prescription, in or to the waters of the San Joaquin River or its tributaries (Grantor hereby declares that it will never assert as against Grantee, his heirs, successors and assigns, that an appropriate or prescriptive water right is appurtenant to the land herein conveyed), and to store and or change the place of use of such

water, whether within or without the watershed of said river, and such right of storage of such water, the right to which has already been established by appropriation or prescription, and or change of place of its use, may be exercised by any purchaser or assignee of said water rights.

That at the date of said deed said Miller & Lux was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River, and by reason thereof was the owner of the right to divert and use a reasonable quantity of water of said river for the irrigation of said land, the watering of live-stock and domestic uses thereon. Likewise said subsidiary corporations, The San Joaquin and Kings River Canal & Irrigation Co., Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal
97 Company, San Luis Canal Company, and Santa Rita Irrigation Company, had theretofore appropriated and used certain quantities of water of the San Joaquin River for the irrigation of certain tracts of land owned by said Miller & Lux Incorporated and others and were the owners of the right to divert and use the amount of water of said river theretofore diverted and used thereon not exceeding the amount reasonably necessary for that purpose. Likewise Southern California Edison Company and San Joaquin Light and Power Corporation had acquired the right to store certain definite quantities of water of said river in certain designated reservoirs under certain contracts with Miller & Lux Incorporated and to use the same for the production of hydroelectric power and to return the same to the San Joaquin River far above the land of plintiff.

By said deed and the said "conditions, covenants and reservations" Miller & Lux Incorporated subjected the riparian rights of the land of plaintiff to the said water rights of Miller & Lux Incorporated and its subsidiary companies, including the right to sell and convey such rights and change the place of use of the water so owned. It also subjected the riparian rights of said land to the said water rights of Southern California Edison Company and San Joaquin Light & Power Corporation. It did not otherwise detract from the riparian rights of the plaintiff's land, nor did it detract from the rights of the land in the water of the river in excess of the rights specifically mentioned. The parties mentioned in said "con-
98 ditions, covenants and reservations" did not thereby acquire or own a right to all of the Waters of

the San Joaquin River or a right to prevent the plaintiff from using on his said riparian lands that water of said river in excess of the rights so reserved, nor did they take away from said land of plaintiff the right to object to the sale or change of place of use of waters theretofore used by persons other than those mentioned in said "conditions, covenants and reservations" where such sale or change was detrimental to plaintiff's land; nor did said "conditions, covenants and reservations" in any way burden the land of plaintiff by any taking of water of said river by defendant (other than the taking or acquisition of the said rights of the parties mentioned in said "conditions, covenants and reservations"), and the damage inflicted upon said land, and upon plaintiff by the taking aforesaid were inflicted by reason of interference by defendant with rights owned by said plaintiff, notwithstanding said "conditions, covenants and reservations".

X.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation, was uncertain as to whether said compensation should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said compensation in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment
99 should be recovered by plaintiff in the Court of Claims of the United States for compensation for such taking. Plaintiff has endeavored to settle and adjust his claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XI.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

XII.

The plaintiff herein and all prior owners of the claim made herein have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government and plaintiff believes the facts as stated in this petition are true.

XIII.

The following acts of Congress and regulations of the Executive Department are relied upon by plaintiff.

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and

containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this
100 report was laid before the committee together with various acts then before Congress as to the extent and form of federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L., p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L., pp. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L., p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,000,000 for the continuance of the project.

101 7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L., pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L., pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U.S.S.A.L., p. 291), which act appropriated $9,000,000 to the Central Valley Project

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L., pp. 685-719), which Act, at page 719, appropriated $10,000,000 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L., p. 87), appropriating $5,000,000 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L., pp. 406, 438), appropriating $23,000,000 for Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S.S.A.L., p. 1209) authorizing the project.

102 14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L., p. 336), appropriating $34,750,000 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S.S.A.L., p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embodied in project.

16. The Act of Congress of December 17, 1941 (55 U.S.S.A.L., p. 827), appropriating $3,000,000 for the project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the project.

WHEREFORE, plaintiff prays that he recover judgment against said defendant for the sum of $90,572.10, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and for costs of suit.

Dated, San Francisco, California.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

103 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing.* (All in italics.)

105 *General Traverse to Case No. 16245. Filed December 5, 1941.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

P.M.C.
N.A.C.
E.E.E.

107 *Intervening Petition of Miller & Lux Incorporated—Filed March 14, 1945.*

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 31st day of January, 1945, and states:

108 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madera, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that the

109 lands described in paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcels comprising said lands bordered upon the San Joaquin River, or were touched by high water of the river or bordered on sloughs which took out of the river.

II.

That commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the South-

ern California Edison Company and the San Joaquin Light and Power Company, and or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, except the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener
110 commenced negotiations for the sale of its said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential

in selling price was maintained by intervener as to
111 said two classifications of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to plaintiff, and on the 30th day of November, 1935 a deed conveying said land was delivered to plaintiff, which deed contained, among other things, the conditions, covenants and reservations set forth in paragraph IX of plaintiff's petition. That the said conditions, covenants and reservations had the effect of excepting and reserving in intervener, its successors and assigns, its subsidiary companies, and the Southern California Edison Company and the San Joaquin Light and Power Corporation all of the usual, ordinary and normal flows of the San Joaquin River, leaving only the unusual, extraordinary and enemy waters which may from time to time flow in said river, none of which is beneficial to said lands of plaintiff, and none of which feed riparian or other rights on said river, and in respect of said unusual, extraordinary and enemy waters the plaintiff has attempted by means of levees and dikes, which he has constructed at great expense, to prevent said waters from flowing onto and damaging his said lands. That all of the usual, ordinary and normal flows of said river at all the times mentioned in plaintiff's petition have been and now are put to beneficial use by intervener, said subsidiary companies, and the
112 said power companies, and none of said waters has been used by the plaintiff on his said lands.

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove referred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company

executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was annexed to said contract, marked Exhibit "B", a map showing the grass lands and riparian lands affected by
113 said contract, which included the lands referred to in plaintiff's petition here, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water
114 from the San Joaquin River: Provided, that the total obligation of Vendors under this Subdivision (c) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally and specifically each and every allegation of plaintiff's petition, and alleges that the land referred to in plaintiff's petition has not been and will not be damaged in the sum of $90,572.10, or any other sum, by reason of said storage and use of water.

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

WHEREFORE, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
March 7, 1945.

J. E. WOOLLEY,
Attorney for Intervener.

Duly sworn to by F. L. Humphrey.
Jurat omitted in printing. (*All in italics.*)

117

Appearance of Southern California Edison Company Ltd. in Response to Notice Under Section 14(b) of Public Law No. 395.—Filed March 19, 1945.

To the Honorable, the Court of Claims of the United States:

Comes now SOUTHERN CALIFORNIA EDISON COMPANY LTD., a corporation, in response to notice pursuant to an order made by this Honorable Court on January 10, 1945, to appear in the above-entitled suit to assert and defend any interest it may have in said suit, and alleges:

I.

The action is one brought by the plaintiff, J. Sheldon Potter, to recover from the defendant, United States
118 of America, compensation for the alleged taking by the United States of riparian rights to the waters of the San Joaquin River in the State of California, appertaining to the lands described in the petition herein, which riparian rights and lands plaintiff alleges he owned at the time of the taking by the United States. The compensation for the said taking by the United States claimed by the plaintiff from the defendant by said petition in the sum of $90,572.10, together with interest at 7 per cent per annum from October 20, 1941 until paid, and said moneys are the subject matter of the action.

II.

Southern California Edison Company, Ltd., herein called "Edison Company", is a corporation organized and existing under the laws of the State of California, engaged in the public utility business of generating, transmitting and distributing electric energy in the State of California.

While Miller & Lux Incorporated was the owner of the said lands described in said petition, the Edison Company, or its predecessors, entered into contracts, in writing, with said Miller & Lux Incorporated, whereby Miller & Lux Incorporated, as the owner of said lands described in said petition, and of other large areas of land in the San Joaquin Valley, and of water rights appertaining to said lands or acquired by appropriation, granted to Edison Company, its predecessors and grantors, rights to divert, store and use the waters of the said San Joaquin River and its tributaries for power purposes, the diversion, storage and use of said waters to be at various points in the mountains, many miles upstream from the location of the Friant Dam referred to in said petition. In addition, said con-

119 tracts provided for the use of waters for domestic and other purposes incidental to the generation of said power. The first of said contracts was that dated August 17, 1906, between Miller & Lux Incorporated and Las Animas and San Joaquin Land Company, Incorporated, parties of the first part, and John S. Eastwood, William G. Kerckhoff, A. C. Balch, H. E. Huntington, and Mammoth Power Company, parties of the second part. Thereafter, thirteen contracts, supplemental to said contract dated August 17, 1906, were entered into. All of said supplemental contracts excepting the last one, which was dated November 25, 1936, were entered into prior to November 30, 1935, the date upon which plaintiff alleges he acquired title from Miller & Lux Incorporated to the lands described in said petition.

The Edison Company now owns all of the rights granted by said contract dated August 17, 1906, as supplemented, and the said alleged water rights of the plaintiff at the time of the taking by the United States were and are subject thereto.

The rights of Edison Company under said contract to the diversion, use and storage of the waters of the San Joaquin River above the lands of the plaintiff are admitted by said petition.

III.

The rights of the Edison Company to divert, store and use the waters of the San Joaquin River and its tributaries above the lands of the plaintiff are no part of the rights of the plaintiff alleged to have been taken by the United States and for which the plaintiff claims compensation. The said rights of the Edison Company do not constitute any part of those rights alleged to belong to the 120 plaintiff, and for which plaintiff seeks to recover compensation against the United States. The United States has not taken, nor does it propose to take, rights of the Edison Company in and to the waters of said San Joaquin River and its tributaries. The said rights of Edison Company to the waters of the San Joaquin River and its tributaries as against the said lands alleged to be owned by the plaintiff now exist and will continue to exist after the alleged taking by the United States of the remaining water rights of the plaintiff.

IV.

The Edison Company operates on the San Joaquin River and its tributaries five hydroelectric generating plants, installed and placed in operation between 1913 and 1929, with an aggregate operating capacity of approximately

400,000 kw. Certain of these plants are operated under permits granted by the Secretary of Agriculture under the Act of Congress of February 15, 1901, and others under the licenses issued under the Federal Water Power Act of June 10, 1920. To provide for the diversion and utilization of water through these plants the Edison Company maintains three storage reservoirs, with approximate capacity of 290,000 acre-feet, together with a series of tunnels and conduits extending many miles through the mountains. All of said works are located many miles upstream from the Friant Dam of the United States, and said Friant Dam is located many miles upstream from the lands of the plaintiff.

V.

One of said reservoirs, the Huntington Lake Reservoir, and Power Houses No. 1 and No. 2 were completed
121 in 1913; the balance of the said works, including two reservoirs and three more power houses, were completed in 1928. Each year since the said works were completed Edison Company or its predecessors have, by means of said works, diverted, stored and used the waters of said San Joaquin River and its tributaries to the extent water was available for the generating of electrical energy at said power houses and certain purposes incidental thereto.

Edison Company alleges that it is the owner of the right to divert, store and use the waters of said San Joaquin River and its tributaries by means of said works for said purposes, by virtue of (a) appropriations by Edison Company under and in accordance with the terms and provisions of the laws of the State of California, (b) the ownership by Edison Company of lands bordering upon and riparian to said streams, (c) the occupancy and use by Edison Company of lands of the United States riparian to said streams under licenses duly issued to it by the Federal Power Commission pursuant to the provisions of the Act of Congress, known as the Federal Power Act, (d) grants to and contracts with Edison Company by owners of lands riparian to the said San Joaquin River and by owners of appropriated rights to the waters of the said San Joaquin River, and (e) the open, notorious, continuous and adverse use by Edison Company of said waters under a claim of right for more than five years.

All of said water rights of Edison Company are prior to and superior to any right of the plaintiff in and to the waters of the San Joaquin River alleged to have been taken by the United States. The lands described in the said

petition herein are subject to all of said rights of Edison Company; said rights are not involved in, and are
122 not the subject matter of, this proceeding and constitute no part of the property of the plaintiff alleged to have been taken by the United States and for which compensation is sought by the plaintiff in this proceeding.

VI.

All of the said water rights of Edison Company, including its rights under the said contracts with said Miller & Lux Incorporated, have been and hereafter will be exercised and enjoyed, and all of the waters of said river and its tributaries aforesaid so diverted, stored and used by Edison Company and its predecessors have been and will be returned to the main channel of the river by Edison Company, at points far above the said Friant Project, except as to certain small amounts of water used incidentally for domestic and other consumptive purposes. The diversion of the waters of said river by the United States by means of the said Friant Project, after the use of said waters by Edison Company and before said waters reach the lands of plaintiff, does not constitute a taking by the United States of any of the rights of Edison Company.

VII.

Edison Company, while claiming to own all of the rights aforesaid and not waiving the same, disclaims any interest in the compensation sought to be recovered by the plaintiff in this proceeding, which is compensation for the taking of certain alleged water rights of the plaintiff which it claims to own subject to the rights of Edison Company.

123

VIII.

Edison Company has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs I, III, VI, VII, VIII, IX, X and XI of said petition, and placing its denial upon such grounds denies each and every allegation therein contained, except as herein specifically admitted or alleged.

IX.

Section 14(b) of Public Law 395 does not grant jurisdiction to the Court of Claims of the United States with respect to the property or other rights of the Southern California Edison Company Ltd. to the waters of the San Joaquin River and its tributaries, or in and to the lands described in the petition herein, or as to the property or other rights of the United States or any other party

to this proceeding as against the Edison Company with respect to the use of the waters of said streams, and said Court of Claims is without jurisdiction to proceed in the above-entitled matter against the Edison Company. Said Section 14(b) of said Public Law 395 is applicable only to proceedings involving the termination of contracts, and the jurisdiction of the Court of Claims is not extended except with respect to that particular matter.

X.

Southern California Edison Company Ltd. has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said government.

124 Wherefore, Southern California Edison Company Ltd., respectfully prays that the Court of Claims order that said Company be dismissed from these proceedings, and that the Court take no other action in these proceedings with respect to said Company.

Dated this 19th day of March, 1945.

PETER Q. NYCE,
1266 National Press Bldg.,
Washington 4, D. C.
Attorney of Record for Southern California Edison Company Ltd.

Of Counsel:
GAIL C. LARKIN,
1113 Edison Bldg., 601 W. 5th St.,
Los Angeles 53, California.

Duly sworn to by Peter Q. Nyce.
Jurat omitted in printing. (*All in italics.*)

125 *San Joaquin Light and Power Corporation's Plea to the Jurisdiction With Briefs in Support Thereof—Filed Mar. 21, 1945*

SAN JOAQUIN LIGHT AND POWER CORPORATION appears in the above entitled matter in response to the order made by the Honorable Court therein on January 31, 1945; avers that it was heretofore a corporation organized and existing under and by virtue of the laws of the State of California; that it was finally dissolved by order of the Superior Court of the State of California in and for the County of Fresno on the 21st day of December, 1944, having prior thereto conveyed and transferred all of its properties, both real and personal, to Pacific Gas and Electric Company, and

that it has at all times borne true allegiance
125a to the Government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said Government.

San Joaquin Light and Power Corporation now and hereby moves the Honorable Court to revoke said order and to dismiss said corporation from said action on the ground that the Honorable Court did not have jurisdiction to make said order and does not have jurisdiction to make any order concerning said corporation for the following reasons, to wit:

1. San Joaquin Light and Power Corporation conveyed all of its properties and has been dissolved as above stated.

2. The cause stated in plaintiff's petition does not arise under Public Law 395—78th Congress, Chapter 358—2d Session, and said Court was not authorized by Section 14(b) of said Public Law to order additional parties brought in except in cases arising under said Act or necessary to give effect to said Act. This case does not arise under said "Termination of Contracts Act".

3. Neither plaintiff's petition nor defendant's answer thereto shows any interest in or claim by San Joaquin Light and Power Corporation to the or any of the riparian rights of plaintiff or to any funds deposited in escrow by Miller & Lux Inc. Said petition shows that plaintiff owns riparian rights in waters of the San Joaquin River naturally flowing at the lands in the petition described subject to rights granted by Miller & Lux Inc. to San Joaquin Light and Power Corporation to store water above Friant Dam for the use of said corporation for power purposes and subsequent use by Miller & Lux Inc. and others, and such
125b rights of San Joaquin Light and Power Corporation were not and are not included as the basis for any compensation claimed by plaintiff.

4. The storage and use by San Joaquin Light and Power Corporation all occurred above Friant Dam and could not and cannot be interfered with by the storage of water by said dam and San Joaquin Light and Power Corporation is not required to make any claim against the limited rights claimed by plaintiff or any claim against or interest in the fund deposited in escrow as alleged in his petition.

5. The respective rights of San Joaquin Light and Power Corporation and Miller & Lux Inc. and its subsidiaries and affiliated companies and their successors in interest were fully adjudicated and determined in an action brought in the Superior Court of the State of California in and for the County of Fresno in an action involved in an appeal to

the District Court of Appeal of the State of California in and for the Fourth Appellate District (136 Cal. App. 495) and in a further appeal to the Supreme Court of California (8 Cal. (2d) 427), and this Honorable Court has no jurisdiction to review or retry the question of title to any such water or water rights involved in determining the matter of compensation to plaintiff pursuant to his said petition.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation.

Of Counsel.
ROBERT H. GERDES,
245 Market Street,
San Francisco 6, California.

126 *San Joaquin Light and Power Corporation's Memorandum on the Facts of the Case in Support of Plea to Jurisdiction*

In his petition plaintiff expressly admits that the riparian rights for which he claims compensation have been reduced by the express exceptions and reservations contained in the grant to him by Miller & Lux Inc. Such exceptions and reservations include rights granted by said Miller & Lux Inc. to San Joaquin Light and Power Corporation to store waters of the San Joaquin River and use the same for power purposes above Friant dam, and neither petitioner nor any other party has challenged the said or any other rights of said San Joaquin Light and Power Corporation. All of the storage and uses of water of the San Joaquin River were made above Friant dam and San Joaquin Light and Power Corporation never claimed or had any rights whatsoever to use any of the waters of said river below said dam. The lands of plaintiff described in its petition are more than fifty miles downstream from Friant dam.

In his petition plaintiff only claims compensation for the taking of such riparian rights as he may presently have and does not show that San Joaquin Light and Power Corporation has ever made any claim to any share in any compensation which may be awarded to plaintiff against the defendant or that it is in any way interested in any amount thereof or would be in any way affected thereby. Neither the petition nor the answer of the defendant shows that San Joaquin Light and Power Corporation is making any claim to or has any interest in the money deposited in escrow by the defendant through the United States Bureau
127 of Reclamation for the purpose of compensating owners of riparian lands situated along the San Joaquin River below said Friant dam.

The rights of the San Joaquin Light and Power Corporation to store water on the upper reaches of the San Joaquin River including its rights under the agreement with Miller & Lux Inc., referred to in the exceptions and reservations in plaintiff's deed from Miller & Lux Inc., were fully adjudicated and established in the case of *Miller & Lux Inc.* v. *San Joaquin Light and Power Corp.*, decided in 136 Cal. App. Rep. p. 495 and 8 Cal. Rep. (2d) 427; and as against the plaintiff and all other owners of riparian lands who derive titles through Miller & Lux Inc., including Miller & Lux, by judgment of the Superior Court of the State of California, in and for Stanislaus County, in the case of *L. A. Vandervort* v. *San Joaquin Light and Power Corp. et al.*, No. 14642.

Even if this court had jurisdiction to require it, a matter we do not concede, it would be unjust and inequitable to compel San Joaquin Light and Power Corporation to appear herein and to meet the burden and expense of proving its former rights to uses of water above Friant dam where it has no interest in the controversy, and benefit of its effort and expense would go solely to the defendant.

San Joaquin Light and Power Corporation's Brief in Support of Plea to Jurisdiction.

Said court did not have jurisdiction under Section 14(b) of Public Law 395—78th Congress, Chapter 358—2d Session, to summon the San Joaquin Light and Power Corporation to assert and defend its rights to the use of the waters of the San Joaquin River as heretofore used and
128 claimed to exist for the reason that the claim set forth in plaintiff's petition does not arise under said Public Law and is not necessary to give effect to said act.

Section 14(B) of said Public Law provides:

"(b) The Court of claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suit or proceeding, within such period of time prior to judgment as the Court of Claims shall prescribe . . . ."

Section 14(c) of said Public Law expressly limits such extended jurisdiction to matters arising under said Public Law. Section 14(c) of said Public Law provides:

"(c) The jurisdiction of the Court of Claims shall not be affected by this Act except to the extent necessary to give effect to this Act, and no person shall recover judgment on any claim, or on an interest on any

claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted."

A careful reading of plaintiff's petition discloses that his claim, if any, arises under the Fifth Amendment to the Constitution of the United States. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. Ed. 463; Judicial Code, Section 145, 28 *U. S. C. A.* Section 250.

The jurisdiction of the Court of Claims is confined to the rendition of money judgments against the United States. *United States* v. *Alire*, 6 Wall (U. S.) 573, 18 L. Ed. 947; *United States* 1. Jones, 131 U. S. 1, 33 L. Ed. 90; *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1059.

129 While evidence of the extent of the water rights so excepted and reserved may become pertinent to the determination of the amount of just compensation to be paid plaintiff for any taking of his present riparian rights, neither the petition of plaintiff nor the answer of defendant shows that San Joaquin Light and Power Corporation claims any interest in the riparian rights now owned by plaintiff or in any fund deposited in escrow by defendant to compensate plaintiff for the taking of such rights. This court has no jurisdiction to compel San Joaquin Light and Power Corporation to litigate its water rights with the plaintiff in order that the defendant might more readily ascertain the value of the rights remaining in plaintiff and the compensation due to plaintiff for the taking of such rights.

In the case of *United States* v. *Sherwood, supra*, the court said:

"If the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court."

United States v. *Jones*, 131 U. S. 1, 33 L. Ed. 90.
Lynn v. *United States*, 110 Fed. (2d) 586.

If plaintiff had sought to bring into this action the San Joaquin Light and Power Corporation in order to ascertain the extent of his rights, the Court of Claims would be without jurisdiction to try such case.

In the case of *United States* v. *Sherwood, supra*, the court said:

"If its maintenance against private parties is prerequisite to the suit against the United States the suit must be dismissed."

Turner v. *United States*, 248 U. S. 354, 63 L. Ed. 291.

130 *Pac. Mutual Life Ins. Co.* v. *United States*, 44 Fed. (2d) 887.

As the storage of water and the use of the same for power purposes by the San Joaquin Light and Power Corporation cannot be interfered with by the storage of water in Friant dam, and Miller & Lux Inc. could not, even if it had assumed so to do, convey to the defendant the rights theretofore granted to said San Joaquin Light and Power Corporation, there is nothing before the court to indicate that said company has any interest in said fund or any compensation to be paid to the plaintiff for the taking of his riparian rights. The situation is quite unlike that appearing in *Intermingled Cotton Cases*, 92 U. S. 654, where each owner of cotton in the pool had an interest in the common fund derived from the sale of the same.

Miller & Lux Inc. v. *San Joaquin L. & P. Corp.*, 136 Cal. App. 495.

Miller & Lux Inc. v. *San Joaquin L. & P. Corp.*, 8 Cal. (2d) 427.

For the reasons hereinabove stated, it is respectfully submitted that the order of said court made on the 31st day of January, 1945, should be revoked, and the San Joaquin Light and Power Corporation should be dismissed from said action.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation,
1026 16th St., N. W.,
Washington 6, D. C.

Of Counsel
ROBERT H. GERDES,
245 Market Street,
San Francisco 6, California.

131 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated—Filed March 28, 1945.*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph IV of said petition, plaintiff denies all of the allegations thereof except that he admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but denies that by any means it offered its lands to
132 the public in two general classifications, lands with water rights, and lands without water rights, but on

the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and he denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but he alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

II.

Answering Paragraph V of said petition, plaintiff denies that the conditions, covenants and reservations therein referred to had the effect of excepting and reserving in intervener, its successors and assigns, its subsidiary companies, and the Southern California Edison Company and the San Joaquin Light and Power Corporation, or any other person,

133 all of the usual, ordinary and normal flows of the San Joaquin River, leaving only the unusual, extraordinary and enemy waters which may from time to time flow in said river; and on the contrary, plaintiff alleges that the said exceptions and reservations left in said river a large amount of the usual, ordinary and normal flows of said river which were highly beneficial to the plaintiff. Plaintiff denies that all of the usual, ordinary and normal flows of said river at all the times mentioned in plaintiff's petition have been and now are put to beneficial use by intervener, said subsidiary companies, or said power companies, and denies that none of said waters have been used by the plaintiff on his said lands.

Further answering said Paragraph V, plaintiff alleges that any levees or dikes which have been constructed on said property were for the purpose of better regulating and controlling the flow of the water of the said San Joaquin River to which the said lands were entitled, in order to make the same most useful and beneficial to said lands.

III.

Answering Paragraph VII of said petition, said plaintiff denies that plaintiff is not entitled to use on the lands described in said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

IV.

Plaintiff denies all the allegations of Paragraph VIII of said petition.

134 V.

Further answering said intervening petition, plaintiff alleges that the water which plaintiff claims was heretofore, in litigation between said Miller & Lux Incorporated, the predecessor of plaintiff herein, and Madera Irrigation District, the predecessor of the defendant herein, adjudged not to be unusual, extraordinary or enemy water, but to be the usual and ordinary flow of said river which the owner of said lands, as against the Madera Irrigation District and its successor, the United States of America, was entitled to use and enjoy.

VI.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of the plaintiff and in law inures to his benefit to the extent provided by said agreement creating said escrow.

WHEREFORE, plaintiff prays that intervenor take nothing by its intervention, and that plaintiff recover judgment as prayed for in his petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to him herein from the escrow referred to in said intervention, to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California,
March 20, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

135 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

137 *Argument and Submission of Cases—*
Jan. 7, 1948.

On January 7, 1948, the cases were argued and submitted on merits together by Mr. Edward F. Treadwell for plaintiffs, and by Mr. Ralph S. Boyd for defendants.

Proceedings after Argument and Submission of Cases.

On March 1, 1948, the court filed findings of fact and conclusions of law, in these cases with opinion by Judge Whitaker.

On April 5, 1948, the court filed an order withdrawing former findings, conclusions of law and opinion, and filing new findings, conclusion of law and opinion which is as follows:

139 *Order.*

On the court's own motion, IT IS ORDERED this 5th day of April, 1948, that the special findings of fact, the conclusion of law, and opinion filed herein March 1, 1948, be and the same are vacated, set aside and withdrawn, and new special findings of fact, conclusion of law and opinion by Judge Whitaker are this day filed. Judgments for plaintiffs are entered as follows:

46009	Gerlach Live Stock Company..... with interest	$10,440.00
46245	J. Sheldon Potter..... with interest	54,343.26
46244	Martin Erreca ..... with interest	2,500.00

* * * * *

46247 Martin Erreca; and Bernard F. Gavin and George D. Coleman, administrators of the estate of Thomas J. Gavin, deceased,— petition dismissed.

The actions as to the interests of the Southern California Edison Company, Ltd., and the San Joaquin Light and Power Corporation are dismissed.

BY THE COURT,

(S) MARVIN JONES
Chief Justice.

141 *Special Findings of Fact, Conclusions of Law and Opinion of the Court by Whitaker, J.*

Filed April 5, 1948.

Mr. Edward F. Treadwell for the plaintiffs. *Messrs. Treadwell & Laughlin* were on the briefs.

Mr. Ralph S. Boyd, with whom was *Mr. Assistant Attorney General A. Devitt Vanech*, for the defendant.

The facts necessary to a decision of these cases are set out in the opinion; they are set out more in detail in the following

SPECIAL FINDINGS OF FACT

1. The Central Valley of California, approximately 450 miles in length, lies between the Sierra Nevada
142 mountains on the east and the fringe of indistinct mountain chains along the ocean on the west. The northerly two-fifths of the valley known as the Sacramento Valley, is drained by the Sacramento River system, and the southerly three-fifths, known as the San Joaquin Valley, is drained by the San Joaquin River system. The Sacramento River flows south and the San Joaquin flows northwest. Both empty through the same large delta into Suisan Bay, an arm of San Francisco Bay. The controversies in these cases center around the right to the use of water of the San Joaquin River.

THE SAN JOAQUIN RIVER AND ITS FLOOD PLAIN

2. The San Joaquin River is a natural watercourse, with well-defined channels and banks and with its source in the Sierra Nevada Mountains. It flows thence westerly to the plains of the San Joaquin Valley, which it enters at a point known as "Friant," the site of defendant's storage and diversion dam, whose effect upon the waters of the river is the basis of plaintiffs' claims in these actions. From this point, the river continues westward approximately 40 miles to a point in the valley near the town of Mendota, where it is joined by the Fresno Slough of Kings River. It then turns abruptly toward the north and flows in a northwesterly direction until it reaches San Francisco Bay. Certain tributaries empty into the San Joaquin between Friant and the lands of the respective plaintiffs and contribute water in varying amounts to the river's flow.

3. In its course through the mountains and foothills and for some distance after it reaches the valley floor, the banks of the San Joaquin are so high as to preclude overflow, but after the river reaches a point known as Gravelly Ford, about 27 miles west of Friant, the banks become relatively low. In a state of nature and during periods of high or flood water, the river flowed out of its banks at places below this point and over and upon certain of the land on either side of the river, either directly or after flowing into sloughs or branch channels. Certain of the lands so overflowed were moistened, enriched, and fertilized
143 by the overflow and, as a result, produced increased amounts of beneficial vegetation, except in the case of infrequent floods of unusual extent.

In the area of such overflow, the river flowed through numerous side-channels, branch channels, reaches of backwater, and sloughs, in addition to the main channel, such extra channels being referred to generally as "sloughs."

Some of the sloughs form networks; some have dead ends; some receive only backwater, and some receive water from the river and return it to the river at lower points, either directly or through connecting sloughs. Some sloughs branch off other sloughs. Some carry river water whenever there is water in the main channel; others carry river water only at higher river stages.

4. In the vicinity of the lands described in plaintiffs' petitions, the San Joaquin River, in a state of nature and at the lowest stages of flow, was confined by natural banks to a sandy channel between lands which were granted to the State of California as swamp and overflow lands under the Swamp Land Act of September 28, 1850, ch. 84, 9 Stat. 519. This channel, except during stages of higher flow, hereinafter described, contained the water flowing in the river and is referred to as the "low channel."

Within a few years after the passage of that act, the lines segregating such swamp and overflow lands from the adjoining higher lands were surveyed and platted by the United States. In substance, the surveyed line of segregation marked certain natural banks at various distances from the low channel banks of the river. At higher stages of the river in every year of ordinary flow, the waters spread over the swamp and overflow lands, and for a time were confined to a wider channel by such natural banks, which were substantially the outer boundaries of the lands granted as swamp and overflow. This wider channel is referred to as the "high channel."

In every year of ordinary flow in a state of nature the river rose still higher, so that its waters were no longer confined to the high channel. The waters so overflowing the high channel banks and into and over the upland area moved slowly in the same general direction as the flow of the river in the low and high channels. This wide
144 overflow was confined by rising ground on each side of the general overflow basin of the river. This is referred to as the "overflow channel."

The flood plain described in this and the preceding finding extends approximately from Gravelly Ford to a short distance below the confluence of the San Joaquin with the Merced River.

The natural flow of the river has been and is variable in quantity, both over the years and in periods within the years. In the spring and summer the river is fed by the melting snow pack of the Sierra Nevada Mountains and in the winter season by rainfall, supplemented by a small amount of snow-melt in the lower reaches of the mountains.

As a result there have been two periods of high water, the winter rain flood usually in December, January, and February, and the spring or summer snow-melt overflow usually in April, May, and June, with considerable variance in the times of commencement, duration, and the times of peak flow.

5. The lands described in the petitions of plaintiffs J. Sheldon Potter, Martin Erreca, No. 46244, and Martin Erreca, *et al.*, No. 46247, border the main channel. Such lands, as well as those described in the petition of Gerlach Live Stock Company, are penetrated or traversed by certain of such sloughs and are affected by the water flowing therein, or in the main channel, or by both, in the manner more fully set forth hereinafter.

The relative locations of the lands owned by the respective plaintiffs herein, proceeding in the downstream direction, are as follows: J. Sheldon Potter, the two Errecas, and Gerlach Live Stock Company.

6. Mariposa Slough, also called Hardpan Slough, leaves the east bank of the river through multiple headings upstream from the lands described in the petition of J. Sheldon Potter. As it flows in a northwesterly direction, its course diverges from that of the river at an angle of about 20°. When it reaches the Potter land, it becomes a portion of the northeastern boundary thereof. It continues in
145 the same general direction until it is intersected by the East Side Canal, hereinafter more fully described, at a point designated as Little Sand Spillway, a control gate which permits water to flow out of the canal into the continuance of the slough. From this point the slough crosses the northeast corner of the lands described in the petition in Martin Erreca, *et al.*, No. 46247. About a mile and a half to the west, it reenters such Erreca lands through the north boundary thereof and empties into Chamberlain Slough, hereinafter described.

A northern branch of Mariposa Slough, sometimes called Deep Slough, leaves East Side Canal approximately two and one-fourth miles down the canal from Little Sand Spillway, at a point designated as Three Bridges Spillway. This Branch runs thence northwesterly until it empties into Bear Creek, a natural watercourse which flows into the San Joaquin River from the east, down river from the lands involved in these four actions.

7. Chamberlain Slough, sometimes called Sand Slough, is a branch channel of the San Joaquin River. It branches from the east bank of the river downstream from the head of Mariposa Slough, and about a half mile upstream from the southeast limits of the land described in the petition

J. Sheldon Potter. A short distance inside the Potter east boundary, Chamberlain Slough branches into two channels. The eastern branch flows northerly and empties into Mariposa Slough in the reach where the latter slough bounds the Potter land on the northeast. The western branch of Chamberlain Slough crosses the westerly portion of the Potter land, roughly paralleling the river. It is intersected by the East Side Canal at the west end of the Potter land and is utilized as a channel for the Canal for about a mile to a point designated as "Big Sand Spillway." The Canal leaves the slough at that point. Chamberlain Slough turns at a right angle to the west and crosses the Martin Erreca, *et al.*, No. 46247, land in a westerly and northerly direction. In the western part of such Erreca land it is joined by Mariposa Slough and returns to the river about a half mile beyond the Erreca west boundary. Both Mariposa and Chamberlain Sloughs have a number of minor branches.

146

The sloughs are not known in the vicinity by the same names to all persons familiar with them and much confusion results because of this fact, even on maps. Chamberlain Slough, where it crosses the Martin Erreca, No. 46247, land is sometimes called Mariposa Slough, and was so referred to in the Haines decrees hereinafter mentioned.

8. At the downstream end of the Potter land a large artificial channel known as East Side Canal takes out of the east bank of the river. It was constructed for the purpose of conveying San Joaquin River water to irrigate lands some distance north of those involved in these four actions. It extends from the river approximately 20 canal-miles in a northwesterly direction, roughly paralleling the river at distances of 2 to 4 miles. The first mile and a quarter of the East Side Canal is an artificial channel. The canal then intersects and utilizes the channel of Chamberlain (or Sand) Slough. After approximately a mile, Chamberlain Slough veers to the west, and from that point the Canal continues in an artificial channel. Control gates at points where the canal intersects sloughs or streams provide for the regulation of the flow so that water may be confined to the canal, spilled into the sloughs or streams, or both, as may be determined from existing conditions.

PRIOR APPROPRIATIVE AND PRESCRIPTIVE RIGHTS.

(a) *Miller & Lux Incorporated and Its Subsidiaries.*

9. Miller & Lux Incorporated is and at all times here involved was a corporation organized and existing under the laws of the State of Nevada and doing business in the State of California.

Prior to any of the times here involved, Miller & Lux Incorporated became the owner of large areas of land, beginning with a narrow strip at Gravelly Ford and extending in varying widths down the San Joaquin Valley to approximately the junction of the Merced River with the
147 San Joaquin River, among which lands were those described in the petitions of the plaintiffs in these four cases. Plaintiffs became the owners of the lands described in their petitions as successors to Miller & Lux Incorporated, by either direct or mesne conveyances. A large portion of the lands owned by Miller & Lux Incorporated, including those described in the petitions of the plaintiffs herein, was riparian to the San Joaquin River, or to sloughs or branch channels thereof, and in some instances to both.

10. At the respective times here involved, San Joaquin & Kings River Canal & Irrigation Company, Gravelly Ford Canal Company, Columbia Canal Company, Firebaugh Canal Company (formerly Panoche Canal Company), and San Luis Canal Company were corporations subsidiary to Miller & Lux Incorporated, which owned all or a majority of the stocks of each of such subsidiaries and had the controlling interest in each of them.

Prior to any of the times here involved, such subsidiary corporations, with the consent of and under agreements with Miller & Lux Incorporated, constructed certain canals and works and thereby diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands riparian to the San Joaquin River owned by Miller & Lux Incorporated, and also for the irrigation of lands non-riparian to the San Joaquin River owned by Miller & Lux Incorporated and by other persons.

Also prior to any of the times here involved and in addition to the foregoing diversions, Miller & Lux Incorporated constructed certain canals and works and thereby diverted and appropriated waters of the San Joaquin River for the irrigation of lands owned by it, both riparian and non-riparian to the San Joaquin River.

11. A large part of the water so diverted and appropriated by Miller & Lux Incorporated and by its subsidiary companies was appropriated and diverted and was and is used for the irrigation of croplands. A large part also was diverted and appropriated and was and is used for the purpose of irrigating grass or pasture lands through the medium and under the control of canals, ditches,
148 levees, and other works. Such grasslands are referred to as "controlled grasslands."

In addition to the croplands and controlled grasslands so irrigated, Miller & Lux Incorporated owned lands of another character riparian to the San Joaquin River, its branches and sloughs, including the lands described in the petitions of the plaintiffs herein. During the periods of spring and winter high water or floods, the waters of the San Joaquin River flowed by and over and upon such grasslands by means of the main channel, and branch channels and sloughs, and enriched and moistened such lands, and caused them to produce increased amounts of pasturage, and provided water for cattle and other livestock. Lands so watered are referred to as "uncontrolled grasslands."

12. The diversions mentioned above were upstream from the lands described in plaintiffs' petitions and the parties to these actions do not dispute that the rights founded on these diversions and the use of the water so diverted are entitled to be satisfied out of the waters of the San Joaquin River before the plaintiffs in these four cases are entitled to the use of any waters of the San Joaquin River. Because of the variability of the flow, satisfaction of these rights and of other undisputed prior rights hereinafter mentioned require the entire supply of water in the river at certain times of the year, and at all times of the year in some years of exceptionally low water.

13. The greater part of the water so diverted was and still is diverted by means of two dams across the San Joaquin River upstream from the lands and sloughs involved in these four cases.

The first is at a point near Mendota, a short distance below the confluence of the San Joaquin River and Fresno Slough of the Kings River. The dam in its original condition was built in 1871 by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, under contract with Miller & Lux Incorporated, for the purpose of diverting San Joaquin water into several large canals heading immediately above the dam, and has been progressively maintained, improved, and replaced by Miller & Lux
149 Incorporated for that purpose ever since. It was not built for and is not used for storage purposes. As an incident to raising the level of the water for the purpose of diversion, a certain amount of channel storage resulted. It does not appear that the amount of water thus stored was more than a relatively negligible amount, or that it was utilized as stored water, or for any purpose other than maintaining the level necessary for diversion.

The second principal point of diversion is at "Sack Dam," so named because it was rebuilt yearly for many years with brush and sacks of earth, at the head of Temple Slough.

which branches off the west side of the river about 19 miles downstream from the Mendota Dam. More recently the dam has been rebuilt with loose earth thrown up by bulldozers. It was originally built by Miller & Lux Incorporated about 1873, and is rebuilt annually for the purpose of diverting San Joaquin River water to irrigate land west of the river.

Each year when the flow of the river drops to a point where it is necessary to take all the flow at Temple Slough to satisfy the prior appropriative and prescriptive rights, Sack Dam is rebuilt. This occurs most frequently in June and July. Usually, the dam is maintained in place until October, November, or December. During the time it is so maintained, except for immaterial interruptions, all the water remaining in the river at that point is diverted and plaintiffs do not receive and are not entitled to receive any material amount of water from the river.

(b) *Uncontested Alteration of River Regimen by Power Companies*

14. During the period from 1895 to 1928, Southern California Edison Company Ltd. and San Joaquin Light and Power Corporation, or their predecessors, constructed dams and reservoirs in the San Joaquin River basin above Friant Dam and stored water in the reservoirs and released and regulated the flow of the waters through a series of power plants. Beginning in 1906, Miller & Lux Incorporated and its subsidiaries entered into numerous contracts with the two power companies, or their predecessors, by the terms of which it was agreed generally that, subject to certain limitations as to times and quantities, the two companies might store waters of the San Joaquin River System during comparatively high stages of the flow, and use the stored water for the production of power and return it to the river above the lands owned by Miller & Lux Incorporated during lower stages of the flow.

The effect of such operations has been to reduce the amount of the flow in periods of high water and to increase the amount of the flow during periods of low water. As new reservoirs were put into operation during these years, the regimen of the river below Friant was materially and progressively altered.

The parties do not dispute that the relative rights of the plaintiffs in these four cases to the use of the waters of the San Joaquin River are limited to the flow of the river as altered by operations of the power companies under the agreements above-mentioned.

15. There is no controversy in these actions between the Southern California Edison Company Ltd. and the San

Joaquin Light and Power Corporation, or between either of the two power companies and any other party to these actions, concerning the storage and use or the right to store and use the waters of the San Joaquin River by either of the two power companies, as above described. Neither of the two power companies has any interest in the matters in controversy between other parties to these actions and neither claims any part of the compensation sought to be recovered by any of the plaintiffs.

All parties in the case of *J. Sheldon Potter* v. *United States*, No. 46245, and *Martin Erreca* v. *United States*, No. 46244, in which cases the two power companies were joined as parties by order of the Court, have stipulated that these actions may be dismissed as to the two power companies, without prejudice.

(c) *Rights adjudicated by the Haines decrees and other prior rights*

16. Commencing about the year 1916, certain individuals, organizers of Madera Irrigation District, formulated
151 a plan for the establishment of an irrigation district for the irrigation of certain land north and east of the San Joaquin River. This plan contemplated the construction of a dam on the San Joaquin River at the same place where the United States has since constructed Friant Dam, hereinafter mentioned, and the storage and diversion of San Joaquin River water to irrigate land in the District.

The District, when organized, comprised 170,000 acres of land. The District obtained title to lands necessary for the construction of the dam, and it and its predecessors filed applications with the Division of Water Resources of the Department of Public Works of the State of California, pursuant to the laws of that state, to appropriate certain of the unappropriated waters of the San Joaquin River for the irrigation of land within the District. Thereafter, by an instrument in writing dated January 29, 1940, the Madera Irrigation District conveyed to the United States the lands so acquired, together with:

> All right, title, and interest of the District in and to all water rights, and all of its rights to the use of water of whatsoever kind or nature, whether rights by appropriation, prescription, or by virtue of said District's ownership of riparian lands, in, to, or upon, and from the San Joaquin River, its tributaries, channels, and sloughs, including the ordinary and extraordinary flows thereof and including the right to store any of said water together with the right as against said District,

and as against said District only, its successors and assigns, to impound, store, and divert all of said water for use within or without the watershed of said rivers. It is the intention of the District by this deed to grant, bargain, sell, convey, and confirm unto Grantee all of the District's right, title, and interest of every kind and character in and to any of the waters of, and its right to store, divert, and use, and as against said District, and against said District only, the right to store, divert, and use within or without the watershed of said river, any of the waters of the San Joaquin River, including its tributaries, channels, and sloughs, but excluding those tributaries which drain into said river below Mendota Dam, located in Section 19, Township 13 South, Range 15 East, M. D. B. & M.

Said rights herein granted include but are not limited to the rights acquired by virtue of the following
152 applications of the District to appropriate water from the San Joaquin River, on file with the Division of Water Resources of the State of California, pursuant to the provisions of the Water Commission Act (Chap. 586, Statutes 1913, as amended):

Application number	Date of filing	Amount of direct flow, second feet	Amount of storage, acre-feet
234	Jan. 19, 1916	3,000	500,000
1465	Sept. 26, 1919	3,000	500,000
2792	Mar. 13, 1922	9,000	600,000

Plaintiffs contend that under the doctrine of *res judicata*, the defendant, as the successor in interest to Madera Irrigation District, is bound by determinations of fact and law in three cases hereinafter mentioned in which Madera Irrigation District was party defendant and Miller & Lux Incorporated and certain of its subsidiaries were parties plaintiff.

17. Prior to the execution and delivery of the deed described in finding 16, Miller & Lux Incorporated and two of its subsidiary companies commenced three actions in the Superior Court of the State of California, in and for the County of Fresno. In one of the actions, No. 25729, *Miller & Lux Incorporated* was plaintiff and *Madera Irrigation District* and certain individuals were defendants. A decision, consisting of findings of fact and conclusions of law, was rendered in that case on January 4, 1933, and a decree was entered in accordance with such decision on January 26, 1933. In the second action, No. 25730, the *San Joaquin &*

Kings River Canal & Irrigation Company, Incorporated (successor to San Joaquin & Kings River Canal & Irrigation Company) was plaintiff, and *Madera Irrigation District* and certain individuals were defendants. A decision was rendered in such action on January 4, 1933, consisting of findings of fact and conclusions of law, and a decree was thereafter entered in accordance with such decision. In the third action, No. 25731, *San Luis Canal Company, a Corporation*, was plaintiff and *Madera Irrigation District* and certain individuals were defendants. A decision in this case was rendered December 31, 1932, and a decree
153 was thereafter entered in accordance with such decision. These decisions and the decrees entered upon them are referred to in the evidence herein as the "Haines decrees," so called because they were rendered by Honorable Charles C. Haines, Judge of the Superior Court.

18. In the decisions mentioned above the following adjudications were made:

(a) That certain land of Miller & Lux Incorporated was riparian to the San Joaquin River and to its branches and channels, and that Miller & Lux Incorporated was entitled to all the rights of a riparian owner with respect thereto.

Such land included all the land described in the petitions of the four plaintiffs herein.

(b) That all land which was within the flood plain of the river and in a state of nature was customarily overflowed by the water of the river, including all land returned as swamp and overflow land, was riparian to said river, and was entitled to the rights of a riparian owner with respect thereto.

Such land included all lands described in the petitions of the four plaintiffs herein.

(c) That all sectional parcels of land made fractional by the segregational line between the swamp and overflow land and the upland which bordered upon and were touched by waters of the San Joaquin River customarily flowing over the swamp and overflow land within the flood plain were riparian to the San Joaquin River and were entitled to all the rights of a riparian owner with respect to the water of said river.

(d) That at and along and in the vicinity of the segregational line between the swamp and overflow land and the upland, there existed a secondary bank to the San Joaquin River, and that all land adjacent to such bank and adjacent to and touched by the water confined by such bank was riparian to the San Joaquin River and was entitled to all the rights of a riparian owner with respect to the water of the river.

(e) That the water of the San Joaquin River overflowing the swamp and overflow lands causes water to percolate into the said lands, and to reach the water table under said lands, and to increase the height of the water
154 table under said lands, and to cause the formation of a body of water which flows in the same general direction as the water in the surface channel of the river, and to constitute an underground water supply which is beneficial to said land, and in which the owners of the land have all the rights of riparian owners.

(f) That the high or flood flows of said river in the winter, spring, and summer were highly beneficial for the production of grass and pasture, and that all of the flow of said river, including the high or flood flow in the winter, spring, and summer, was a part of the natural and ordinary flow of said river to which Miller & Lux Incorporated was entitled, with the exception of flows in excess of 20,000 second-feet at any one time, or in excess of 3,000,000 acre-feet in any one year; that flows in excess of those amounts are infrequent, extraordinary, and unusual, and are not a part of regular and customary flow of the water of the river.

(g) That the appropriations made by the Madera Irrigation District were invalid and ineffective, as against the rights of Miller & Lux Incorporated to the full flow of the stream for the purpose of fertilizing and irrigating the lands of Miller & Lux Incorporated, except with respect to flows in excess of 20,000 second-feet at any one time or in excess of 3,000,000 acre-feet in any one year.

19. In the decision in the case of *Miller & Lux Incorporated* v. *Madera Irrigation District*, No. 25729, there were also specific findings in relation to the lands of each of the plaintiffs herein. These findings are hereinafter referred to separately in connection with the separate claims of each of plaintiffs.

20. The *Haines* decrees also adjudicated that Miller & Lux Incorporated and its subsidiary companies had appropriated certain quantities of water for the irrigation of the land there involved, including crop land and controlled pasture land, and that such diversion, appropriation, and use had continued adversely to all the world for more than five years; that Miller & Lux Incorporated and its subsidiaries had acquired thereby a prespective right to the use of the water so appropriated, and that Miller & Lux, Incorporated and its subsidiaries were the owners by prescription and appropriation of the rights so defined in the decrees. These rights were expressed in terms
155 of cubic feet per second, but, except in two instances,

with a limitation as to the total diversion in terms of acre-feet per year.

The descriptions by which such appropriative and prescriptive rights are known, with the maximum rates of flow and maximum quantities of water, are included in the list of prior rights set forth in finding 21.

A cubic foot per second, also called a second-foot, is the rate of discharge flowing in a channel of a rectangular cross-section one foot wide and one foot deep at an average velocity of one foot per second. Water flowing at the rate of one cubic foot per second for 24 hours will produce a volume of water equal to approximately 2 feet in depth covering one acre, or two acre-feet.

21. On October 20, 1941, and for a long time prior thereto there existed a number of appropriative and prescriptive rights which were entitled to be satisfied out of the waters of the San Joaquin River flowing past Friant before the riparian rights of the lands described in the petitions of the plaintiffs in these four actions became entitled to the use of any such water. In the *Haines* decrees, Miller & Lux Incorporated and certain of their subsidiaries were adjudged to be the owners of some of such rights.

The material appropriative rights adjudicated in the *Haines* decrees are identified and the maximum quantities to which they were adjudicated to be entitled are as follows:

Name	Maximum cubic feet per second	Yearly maximum acre-feet
Case No. 25729, Miller & Lux Incorporated, plaintiff:		
Aliso Canal (diverted from head of Aliso Slough)	302	59,784
Chowchilla Canal (diverted from Lone Willow) Slough)	120	49,300
Columbia Canal (diverted through Lone Willow and Brown Sloughs)	150	45,374
Lone Willow Slough, Aliso Slough, Brown Slough (diverted through various weirs, dams, and other works)	313	61,907
Temple Slough	463	157,296
San Joaquin Canal (diverted by Miller & Lux through canals of San Joaquin & Kings River Canal & Irrigation Co.)	285	128,294
Mowry Slough (Little San Joaquin)	26	5,218
Borland Ranch	14	7,580
Pick Anderson Slough (diverted by canals taking out of Pick Anderson Slough and by dams and levees in and along said slough and its branches)	88	17,600
Orestimba Grant (diverted through Poso, Temple, Santa Rita, Pick Anderson, and other sloughs by weirs, dams, and levees in and along said sloughs)	264	52,264
Case No. 25,730, San Joaquin & Kings River Canal & Irrigation Co., Incorporated (diverted through Main Outside, and Helm Canals and Helm Ditch)	1,360	512,730
Case No. 25,731, San Luis Canal Co. (now known as Helm Canal)	540	176,388

156 In the instance of the Chowchilla right, the *Haines* decrees did not fix a maximum yearly number of acre-feet. The yearly maximum stated above is computed in accordance with use, agreements, and the *Haines* decrees. It is also very close to the figure reached by multiplying the acreage served (13,700) by a water duty of 3 acre-feet per acre, plus loss of water in transportation, estimated at 20%. This right was originally owned equally by Miller & Lux Incorporated and Chowchilla Farms, Incorporated. Prior to the time of its transfer to the United States, as hereinafter shown, it became owned entirely by Miller & Lux Incorporated.

In the instance of the Columbia Canal, the diversions in cubic feet per second allowed by the decree varied month by month from a low of 40 cubic feet per second during the months of October to February, inclusive, to a maximum of 150 cubic feet per second during June.

In the instance of Temple Slough, the diversions in cubic feet per second allowed by the decree varied from month to month from a low of 26 cubic feet per second during the month of December, to a high of 463 cubic feet per second during the month of June.

In the instance of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, the diversions in cubic feet per second allowed by the decree varied from month to month from a low of 100 cubic feet per second during December, to a maximum of 1,360 cubic feet per second during the months of May to August, inclusive.

There has not been sufficient evidence introduced to fix the existence, extent, and relative priorities of the appropriative and prescriptive rights adjudicated in such decrees without evidentiary value of the decisions and judgments themselves. Plaintiffs offer the *Haines* decrees as defining both the appropriative and riparian rights. Defendant contends that the owners of appropriative or prescriptive rights described in the *Haines* decrees have, since the decrees, acquired by appropriation and prescription the right to divert quantities of water beyond the limits stated in the *Haines* decrees. There is not sufficient evidence to sustain such contention by defendant, and it is found that on October 20, 1941, the appropriative
157 and prescriptive rights specified in such decrees were of the extent and subject to the limitations therein defined.

On October 20, 1941, and for a long time prior thereto, other subsidiaries of Miller & Lux Incorporated and other diverters had additional appropriative and prescriptive rights which were entitled to be satisfied out of the waters

of the San Joaquin River flowing past Friant before the riparian rights of the lands described in the petitions of these four plaintiffs became entitled to the use of any such water. The names by which such rights are identified and the limits of such rights are as follows:

Name	Maximum cubic feet per second	Maximum yearly acre-feet
Gravelly Ford Canal Co	600	39,314
Firebaugh Canal Co	300	68,025
James and Tranquillity Irrigation Districts		29,300
Blythe Canal		11,600
Edison Securities Cos		6,100

There were also lands irrigated from the waters taken from the San Joaquin River between the headworks of the Gravelly Ford Canal and Friant Dam. The rights to the use of such waters are prior to the riparian rights of the lands described in the petitions in these four cases. Plaintiffs concede that the amount of water to which such rights are entitled is 30,464 acre-feet per year.

Such prescriptive and appropriative rights are entitled to receive a maximum of 1,458,538 acre-feet of water in the aggregate, before the riparian rights of the lands described in the petitions of the plaintiffs become entitled to the use of any of the water of the San Joaquin River.

THE WATER SUPPLY AND THE SURPLUS AVAILABLE TO PLAINTIFFS

22. Among other factors, the extent and the value of the riparian rights of the lands described in the petitions of plaintiffs herein depend upon the quantity of water which reasonably may be expected to become available for use on such lands in times subsequent to the time of such valuation.

158 Because of the substantial variation from year to year and from month to month in the quantity of water discharged by the river, the amount of water which may be discharged in any future month, year, decade, or score of years cannot be predicted with any assurance of approximate accuracy. It is, however, customary to use the record of past discharges for the purpose of making estimates of the future discharge of streams.

In 57 of the 68 water years between 1879 and 1946, both inclusive, in which the discharge of water is computed from measurements, the average yearly discharge was 1,811,082 acre-feet.

23. In any year here involved, owners of appropriative or prescriptive rights below Friant Dam and upstream

from plaintiffs were and are entitled to the use of a maximum of 1,458,538 acre-feet of water (finding 21). Deducting the amount of the prior appropriative or prescriptive rights from the average yearly discharge of 1,811,082 would give an average yearly surplus of 352,544 available for use on lands having riparian rights. The records of water actually diverted show that the prior appropriators, in the aggregate, do not divert and put to use as much water as authorized by the rights listed in finding 21. In the period 1932-1944, inclusive, the highest aggregate diversion was 1,020,516 acre-feet, and the yearly average diversion 870,940 acre-feet.

Actually, there were few years when the discharge was approximately that of the yearly average. In many years the excess on the yearly average ran high and in many years the deficiency dropped low. In some of the low years, the discharge was less than the aggregate of maximum diversion to which prior appropriators were entitled.

24. Yearly discharges varied in volume from a high of 5,211,000 acre-feet in 1886 to a low of 507,000 acre-feet for the year 1924. By ten-year periods, the average yearly discharge was as follows:

Years:	*Yearly average in acre-feet*
1937-1946, inclusive	2,030,300
1927-1936, inclusive	1,286,200
1917-1926, inclusive	1,463,700
1907-1916, inclusive	2,210,044
1897-1906, inclusive	1,799,157
1887-1896, inclusive (estimated)	1,952,870
1879-1886, inclusive (8 years)	2,476,125

159. During each of such ten-year periods, the discharges for separate years varied widely.

25. As the flows actually occurred, there were times of the year when, as a matter of right, the owners of appropriative and prescriptive rights, without reaching or exceeding their maximum limits in cubic feet per second, diverted substantially all of the water of the stream, leaving no surplus for downstream riparian owners. At other times, the discharge exceeded the capacity of the diversion works of such appropriators and their requirements for use, as well as exceeding the maximum limit in cubic feet per second under their rights. At such times a surplus flowed down the river to become available for use by riparian owners.

The discharge is not uniform throughout a year, nor do the relative discharges for the months within the year re-

main constant. The highest monthly discharge during the year usually occurs in May or June, although occasionally it occurs in April or August. The yearly cycle, with its variability, is illustrated by the following table showing the percentage of the yearly total discharged each month:

Month	Monthly percentage for the year 1945.	Average monthly percentage for the period 1905-45, inclusive
January	3.116	4.123
February	8.581	5.326
March	7.642	7.543
April	12.242	11.074
May	15.045	16.356
June	12.561	15.703
July	11.149	25.356
August	8.451	4.414
September	6.085	2.757
October	5.370	2.389
November	4.621	2.116
December	5.137	2.843

26. During the irrigating season each year, when the discharge has dropped below the amount required to satisfy the appropriative or prescriptive rights upstream from plaintiffs, and such prior rights take all the water of the river, the final downstream diversion is made at the head of Temple Slough, where a temporary dam, heretofore referred to as "Sack Dam," is placed across the river.

A chart showing the dates when the dam was put
160 into operation each year for the period 1926-1945, is in evidence. The times the dam was put into operation corresponded with the times following the peak of the spring flood, when the discharge decreased to a point where it became necessary to take the whole flow for the use of the prior appropriative and prescriptive rights.

The period shown by such chart included some years of exceptionally high and some years of exceptionally low discharges, as well as several years in which the discharge approximated the long-time yearly average. In the absence of a complete record of the dates on which Sack Dam was annually installed, the chart for this period is accepted as indicating the times the dam was installed in other years under approximately similar discharge conditions.

27. Not taking into consideration temporary installations or unsubstantial interruptions in maintenance, Sack Dam was installed at the following times in the twenty-

year period 1926-1945, inclusive, and all water of the San Joaquin River flowing at the site thereof was diverted from the river for the remainder of the irrigating season (except for an immaterial amount of seepage and a small quantity permitted to pass through a fish weir in the years 1944 and 1945):

Period during which dam installed:	*Number of years out of 20 the dam was installed in the period specified*
Between February 1-15, inclusive	1
Between March 1-15, inclusive	3
Between March 16-31, inclusive	1
Between May 16-31, inclusive	1
Between June 16-30, inclusive	2
Between July 1-15, inclusive	6
Between July 16-31, inclusive	2
Between August 1-15, inclusive	3
Between August 16-31, inclusive	1

Comparison of these dates with the records of annual discharges show that, in general, the higher the average annual discharges of the river, the later in the year was Sack Dam installed.

28. The records of diversions also show that there is a period in every year, usually commencing in October, November, or December, when Sack Dam is discontinued for the water year. Such period of open flow ends the next summer when there is no longer an excess of water over the requirements of the prior appropriative and
161 prescriptive rights, and Sack Dam is reinstalled.

Generally, this open period commences just prior to the winter rains, when the discharge of the river is relatively low, but the demand for water is even lower. The excess of supply over demand continues through the rising volume of discharge caused by the winter and spring floods. It continues through the peak of the spring floods and is cut off by the installation of Sack Dam as the high discharges from the spring floods begin to subside. It is only during this period that water is available for use under downstream riparian rights.

However, the downstream riparian lands are not irrigated by such water throughout the whole period of such surplus, but only during a relatively short period at the peak of the spring floods, except in years of exceptionally low water, when the spring floods flow over and upon the grasslands described in the petitions of plaintiffs and moisten and enrich them, as hereinafter stated, and benefit and increase the growth of grass and other forage.

During the whole period in which a surplus passes the site of Sack Dam, water of the river becomes available to

riparian owners for domestic use and for the purpose of watering livestock, but it is not satisfactorily established that such uses contribute substantially to the value of the riparian rights. The only substantial benefit is that derived from the moistening and enrichment of the soil by flooding during the relatively short period in which the spring flood reaches such proportions that the lands described in plaintiffs' petitions are overflowed.

As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation. Its flow into the Bay has some effect in repelling the encroachment of salt water into cultivated and cultivable lands on the delta and thus maintaining the usefulness for agricultural purposes. There is no evidence making an exact or approximate evaluation of the use of such surplus water for this purpose.

29. Grasslands in the vicinity and of the kind here involved can utilize approximately 3 acre-feet per acre per year with maximum benefit. The use of less water
162 per acre is beneficial but to a less degree. The use of more water per acre is detrimental.

The quantity of water per acre applied to the irrigation of controlled crop and grasslands is capable of determination with relative accuracy, since the flow can be controlled, measurements can be taken in regulated diversion and distribution works, and the amount of waste computed. However, the quantity of flood water beneficially utilized on uncontrolled grasslands cannot be so measured. After a few hours of flooding, the soil becomes saturated and can absorb no more water. Any additional water flows away, returns eventually to the river, and is lost so far as the flooded land is concerned. The amount of water absorbed depends upon factors which may differ at relatively short distances, among which factors are the depth and the character of material which constitutes the soil. The amount of such absorption, however, is probably under one acre-foot per acre from one flooding. Notwithstanding lack of means to measure the absorption, the flood waters in fact promote the growth of grass and other forage, and the market value of the land with and without the benefit of such growth can be determined.

30. The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners. There are in the flood plain of the river, described in findings 3 and 4, a large number of acres of riparian uncontrolled grasslands, including that described in the petitions of plain-

tiffs, which lands are entitled to share in the surplus water after prior appropriative and prescriptive rights have been satisfied. Downstream from the flood plain here involved are other riparian lands and also some streams flowing into the San Joaquin River from the east side. The quantity, extent, claims, and adaptability of such lands to irrigation are not disclosed by the evidence.

The utilization of the surplus flood waters by such downstream lands is not shown, but the larger part of the flood waters, supplemented by accretions from east side streams, passes these lands without being diverted or utilized. The only plan for utilization of such flood waters disclosed by the record is that of defendant, hereinafter described, the diversions under which plan will not serve such riparian owners downstream. There is no evidence of past use by, or of any plan for the future benefit of, the downstream riparian owners, which is impeded or diminished by the customary flooding of plaintiffs' lands as herein stated.

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31. The deeds by which Miller & Lux Incorporated conveyed lands involved herein to Martin Erreca, Case No. 46244, and the predecessors in interest of Gerlach Livestock Company, each contained a reservation, hereinafter quoted in full in findings 59 and 79, to the effect that, among other things, the riparian rights of the lands so conveyed shall be subject and subordinate to the riparian rights of Miller & Lux Incorporated, its successors, and affiliated companies.

Miller & Lux Incorporated owned, at the times involved, 46,800 acres of the 82,000 acres of riparian uncontrolled grasslands heretofore mentioned. Defendant contends that 3 acre-feet of water per acre can be put to beneficial use on such 46,800 acres, or a total of 140,000 acre-feet per year; that, by reason of the reservations in the deeds, Miller & Lux Incorporated, its subsidiaries and successors have a prior right to that quantity for that purpose, and that 140,400 acre-feet should be deducted as to plaintiff Erreca, No. 46244, and plaintiff Gerlach, when computing the surplus available for their riparian rights.

The 46,800 acres of riparian uncontrolled grasslands owned by Miller & Lux Incorporated is in a situation, in respect to the use of the water of the river, comparable with that of plaintiffs. Such land benefits only by flooding. It has not absorbed and cannot absorb 3-acre-feet per acre from a spring flood, and the larger part of the flood passes down the river and does not benefit any of such riparian land, except as the volume helps to maintain a high water level. Since waters for such riparian rights are available

only at the high period of the spring floods, there is no practicable means of giving to the riparian Miller & Lux uncontrolled grasslands the beneficial use of 3 acre-feet per acre, in the absence of controlled diversion. There is no evidence that in the 75 years since the first artificial diversion by the predecessors of San Joaquin & Kings River Canal & Irrigation Company, Incorporated, there has been any construction of works for the purpose
164 of diverting San Joaquin river flood water to or upon such uncontrolled grasslands under such riparian rights, and there is no evidence of a plan to construct such works. Because of the time required for grassland to utilize 3 acre-feet of water per acre, and because of the relatively short time during which there is a surplus of water above the requirements of appropriative and prescriptive rights, and because of the topographical situation of the lands, controlled diversion is not feasible. The plan of defendant, hereinafter described, will not divert or otherwise supply water to such riparian uncontrolled grasslands.

Whatever effect the reservations above referred to may have as an estoppel, there cannot be a use in fact of the surplus water by Miller & Lux Incorporated, its successors or subsidiaries, upon the 46,800 acres of riparian uncontrolled grasslands in such a manner as to cause a reduction in the surplus available to plaintiffs.

DEFENDANT'S PLAN FOR UTILIZATION OF THE WATER

32. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California.

Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in

the San Joaquin River at Friant. The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant.

165 33. The plan was duly approved by the President of the United States on December 2, 1935, such plan being set forth in a letter dated November 26, 1935, from the Secretary of the Interior to the President, which reads in part:

General Description of Project

The Central Valley project embodies a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers to provide urgently needed water supplies for existing agricultural, industrial, and municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt-hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservior on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal, and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation

of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated
166 in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features

The principal engineering features of the project are as follows:

Kennett Dam Unit.—The Kennett Reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200-mile power transmission line will extend to a main distributing substation near Antioch on Suisan Bay.

Contra Costa Conduit.—A canal, capacity 120 second-feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial, and agricultural water requirements.

San Joaquin Pumping System.—The works for this pumping system will comprise a dam and other works

in Sacramento delta to divert stored water from Kennett Reservoir through a channel into San Joaquin delta for salinity control, irrigation, and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on
167 San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir.—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal.—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal.—The Madera Canal, maximum capacity 1,500 second-feet, will extend from Friant Reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project

Kennett Dam, Reservoir and power plants	$84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant Dam and Reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights, and general expense	8,000,000
Total	[1] 170,000,000

[1] So in the original.

* * * * *

Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

34. The plan has been altered in a number of respects since it was approved by the President. Among other things, the height of the Friant Dam has been increased from 250 feet to 320 feet, enlarging the storage capacity from 400,000 acre-feet to 520,000 acre-feet. The
168 proposed pumping system, which would have conveyed Sacramento River water up the bed of the San Joaquin River by means of natural and artificial channels and works in a series ending at the mouth of the Merced River, has been supplanted by another which will pump Sacramento River water from the delta into the proposed Delta-Mendota Canal, to be carried thence by gravity south to Mendota. The planned capacity of the Friant-Kern Canal has been increased from 3,500 to 4,000 cubic feet per second. Due primarily to the exigencies of the second World War, substantial portions of the project are not yet completed. Friant Dam still is without the drum gates for the spillways at the top and, until such gates are installed, the dam will impound approximately 100,000 acre-feet of water less than the planned storage. Friant-Kern Canal is under construction, but has not been completed.

35. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian uncontrolled grasslands.

The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant. Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that suf-

169 ficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished.

36. With some modification, defendant's original plan has continued as the plan of the defendant, and it has proceeded to carry it out by engaging in the construction of the dam at Friant and the Madera and the Friant-Kern canals, as well as certain other branches of the project.

To finance such work Congress has appropriated large sums of money by the following described acts:

June 22, 1936, c. 689, 49 Stat. 1597, 1622	$ 6,900,000
August 9, 1937, c. 570, 50 Stat. 564, 597	12,500,000
August 26, 1937, c. 832, 50 Stat. 844, 850	12,000,000
May 9, 1938, c. 187, 52 Stat. 291, 324	9,000,000
May 10, 193[illegible], c. 119, 53 Stat. 685, 719	10,000,000
April 6, 1940, c. 77, 54 Stat. 82, 87	5,000,000
June 18, 1940, c. 395, 54 Stat. 406, 438	23,600,000
June 28, 1941, c. 259, 55 Stat. 303, 336	34,750,000

The act of October 17, 1940, c. 895, 54 Stat. 1198, 1200, reauthorized the project, and the act of July 30, 1941, c. 334, 55 Stat. 612, in aid of the construction of the project, provided for acquisition of Indian lands embraced therein.

The Execution of Defendant's Plan

(a) *Purchase of the prior rights of Miller & Lux Incorporated and agreement for exchange of water*

37. Promptly after the approval of the plan, defendant proceeded to ascertain the extent of the controlled grassland and the riparian water rights and the compensation to be paid therefor, and for that purpose an appraisal board was appointed. Attorneys for the United States Reclamation Bureau instructed the board as to the extent of such water rights. The board appraised the controlled grassland rights and the riparian rights of Miller & Lux and its subsidiaries, and thereafter on July 27, 1939, the defendant and Miller & Lux Incorporated and its subsidiaries entered into a written contract whereby Miller &

170 Lux Incorporated and its subsidiaries agreed to relinquish or convey to defendant all their rights to the use of the water of the San Joaquin River, except and in excess of specified rates of flow deemed to be equivalent in quantity to their existing water supply under rights for the irrigation of crop lands. In consideration, the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water

rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grassland rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands.

38. Because of the fact that, prior to the execution of such contract, Miller & Lux Incorporated had conveyed or had agreed to convey certain of the land to other persons, which agreements and conveyances contained certain exceptions, conditions, or reservations in relation to the right to the use of water of the San Joaquin River, and because the question had been raised whether the land involved in such agreements and conveyances retained the riparian rights originally a part of them, the contract contained the following provision:

> (e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.
>
> There is delivered herewith to each of the parties hereto, and as a part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "BUREAU OF RECLAMATION, UNITED STATES DEPARTMENT OF THE INTERIOR, CENTRAL VALLEY PROJECT—Map showing grasslands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and
> 171 Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands in this contract referred to as "Grass Lands" and as "Riparian Lands." The boundaries of said grass lands are outlined in green and the boundaries of the Riparian Lands are outlined in orange. Said map need not be recorded.
>
> In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the

San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B," are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow in amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grasslands.

In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B," are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grasslands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River.

All the lands described in the petitions of plaintiffs herein are delineated upon the map referred to in the contract as being within the boundaries outlined in orange, thus describing them as riparian lands.

39. The rates of flow specified in such contract as being reserved by Miller & Lux Incorporated were mean daily flows in cubic feet per second as follows:

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During the month of—	*Number of cubic feet per second, plus the Chowchilla Canal right*
January	400
February	535
March	1,310
April	1,950
May	2,285
June	2,450
July	2,475
August	2,210
September	1,335
October	660
November	485
December	400

The Chowchilla Canal right varies according to the flow, the maximum per year being estimated at 49,300 acre-feet (finding 21).

Computed on the basis of 2 acre-feet per day for one second-foot of flow and estimating the Chowchilla Canal right at 49,300 acre-feet, the yearly aggregate reserved by Miller & Lux Incorporated, and its subsidiaries, is 1,056,340 acre-feet.

40. On the same day that Miller & Lux Incorporated and its subsidiaries and the defendant made the agreement for the sale and purchase of the controlled grassland and riparian rights, they entered into a further agreement, referred to as the "contract for exchange of waters." This agreement provided in detail for the release of water from Friant Reservoir and for the delivery of substitute water through the Delta-Mendota Canal when that system would become operative.

On September 14, 1939, Miller & Lux Incorporated and Gravelly Ford Canal Company made, executed, and delivered to defendant a conveyance of the rights described in the agreement dated July 27, 1939.

(b) *Construction of works and impounding of water*

41. Friant Dam is a straight gravity concrete dam. Its total length at the top is 3,430 feet and the maximum height is 320 feet. Across the top of the dam is a roadway whose elevation above mean sea level is 583 feet.
173 Unless otherwise mentioned, all the elevations given in connection with the openings hereinafter mentioned are the elevations at the upstream face of the dam and relate to mean sea level.

The only openings extending entirely through the dam are those hereinafter mentioned. The first is the spillway at the top of the dam which is designed to be controlled by three drum gates. These drum gates when installed will be large steel cylinders, each 100 feet long and 18 feet in diameter, which will float up and down in a chamber at the bottom of the spillway opening and will be raised and lowered by the water let into and released from the chamber. By increasing the amount of water in a chamber the gate will float up, closing, to the extent desired, the opening which the particular gate is to control. By reversing the process the gate will go down. It can be adjusted and held to any point. When the gates are raised to the designed maximum elevation, the maximum water surface will be at elevation 578. When the gates are completely lowered, the maximum water surface will be at elevation 560, except for

the head required to flow the water over the spillway. The drum gates were intended to be installed in 1942, but due to the advent of war in 1941, progress in that connection was halted and the drum gates are not yet installed.

The next lower opening is the outlet to the Friant-Kern Canal at the south side of the dam. The center line of the outlet is at elevation 464.

The next lower opening is the outlet to the Madera Canal at the north side of the dam. The center line of the outlet is at elevation 446.

Next are four openings referred to as the permanent river outlets, all on the same level. The inverts, the lowest points in the cross sections of the openings, are at elevation 375.42.

The next were three temporary openings, used during construction to permit the water of the river to pass, but which were later filled with concrete. The floors of these openings were at elevation 316.

The normal low-water surface of the river prior to the construction of the dam was at elevation 305.6.

174 The following table sets out the elevations above sea level and corresponding elevations above the normal low-water surface of the river at the site of the dam.

	Elevation in feet above mean sea level	Height in feet above normal low-water surface of river
Roadway on top of dam	583	277.4
Water surface with drum gates raised	578	272.4
Water surface without drum gates	560	254.4
Center line of outlet to the Friant-Kern Canal	464	158.4
Center line of outlet to the Madera Canal	446	140.4
Invert of river outlets	375.42	69.82
Floor of temporary construction openings	316	10.4
Normal low-water surface of river	305.6	0

42. The contract for the construction of the dam was awarded on October 9, 1939, and construction was commenced on November 3, 1939. In the early stages of construction, and prior to March 6, 1941, the water of the river was carried over the foundation of the dam in a wooden flume. The floor of the flume was 4.4 feet above the normal low-water surface of the river. The amount of water impounded by reason of this difference in elevation is not disclosed. At one time while the flume was being used to pass the water, some high water exceeded the capacity of the flume, backed up behind the dam, and flooded the works. This flooding was not an intended consequence of the work, although a calculated risk.

43. The concrete work of the dam was divided into sections, referred to as blocks, numbered consecutively from one end of the dam to the other. As the concrete work progressed, three temporary openings, each 14 feet square, were left in the base of the dam through blocks 37, 39, and 41. The elevation of the floors of these openings at the upstream face was 10.4 feet above the normal low-water surface of the river. When use of the wooden flume was discontinued and the river was diverted through these temporary openings, there was a permanent impounding of water immediately behind the dam to a depth of not less than 10.4 feet. The number of acre-feet impounded is not shown, but was negligible.

During the late summer or early fall of 1941, the water was cut off from the temporary opening in block 41 and was carried through the temporary openings in blocks 37
175 and 39. Steel gates, in the nature of a headworks structure, then were firmly installed at the upstream end of the temporary outlet through block 41. Next, steel gates were similarly installed in the temporary outlet through block 39. After the gates were installed and in good operating condition, all the water was passed through the gate-controlled openings through blocks 39 and 41, and the outlet through block 37 was completely filled with concrete and permanently sealed off against further passage of water.

As the natural flow decreased with the season, the outlet through block 39 was cut off, all the water was passed through the gate-controlled temporary opening through block 41, and the opening through block 39 was filled with concrete and permanently sealed. That left only the temporary opening through block 41 open and in operation.

44. *Prior to October 20, 1941, the concrete work in the* dam had been completed to above elevation 400, but not as high as the elevation of the designed outlet into the Madera Canal. On or about that day, the gates in the temporary outlet through block 41 were partially closed for the purpose of impounding water and at the same time allowing the passage of approximately the amount of water required to be released under the agreement of July 27, 1939, with Miller & Lux Incorporated and its subsidiaries. This operation raised the surface of the water in the reservoir until, on November 11, 1941, the water reached elevation 375.42 and commenced to spill through the permanent river outlets.

The water was then cut off from the temporary outlet through block 41 and the work of permanently sealing that

outlet was begun. The sealing was completed in about five months. Except for the amount approximately equalling the quantities reserved by Miller & Lux Incorporated and its subsidiaries, no water passed the dam between October 20 and November 11, 1941.

When the water was cut off from the last temporary opening and the opening was sealed, the water below the inverts of the permanent river openings was permanently impounded, with no means left for its release. The amount so impounded was approximately 17,400 acre-feet.

45. The permanent river outlets were designed to be controlled by needle valves. Defendant had been taking
176 steps preliminary to the purchase of the valves when the international situation became so bad, and demands for materials for defense purposes became so great in the fall of 1941, that the valves could not be obtained. Except for the emergency and for the ensuing war, the valves to control the permanent river outlets would have been installed in the year 1942.

In the fall of 1941 the Madera Canal had been constructed to the extent of about 7 miles, but had not yet been completed. Construction of the Friant-Kern Canal had not been commenced.

For a short time in the winter of 1942, a high flow in the river caused more water to enter the reservoir than could be drained by the uncontrolled permanent river outlets and water was temporarily impounded to elevation 415. As the flow of the river dropped, the water impounded above the elevation of the permanent outlets drained through the uncontrolled permanent outlets into the river below the dam. At a time not disclosed by the evidence, temporary plugs were put into two of the permanent river outlets.

In 1943 valves for two of the permanent river outlets and for the Madera Canal outlet were borrowed from Boulder Dam and were installed. The first storage of water in the reservoir by means of closing or partially closing one of these valves was started on February 21, 1944.

46. The Madera Canal was completed in 1944. The surface level of the water in the reservoir was then raised sufficiently to divert a large quantity thereof through the Madera Canal, from which it was used to raise the general water table in the area served by the canal. Approximately 302,600 acre-feet of water was stored behind the dam at this stage of the operation. The flow of water through the dam was never completely stopped. For the six months after the needle valves were installed, the quantity of water released monthly was approximately that required under the agree-

ment of July 27, 1939, between the defendant and Miller & Lux Incorporated and its subsidiaries. During and after September 1944 the releases were substantially larger than the requirements of such contract, except during the months of November and December 1944, when they were substantially equal to such requirements.

177 In 1945 by means of control at the permanent river outlets, the reservoir was filled to the base of the openings for the drum gates, creating a storage of approximately 430,000 acre-feet of water. The drum gates are not yet installed and for that reason the reservoir has not yet filled to its designed capacity.

Other Sources of Supply

47. Defendant contends that there are and will continue to be certain sources of water available to plaintiffs, notwithstanding the construction of Friant Dam and the planned diversion of water through the Madera and Friant-Kern Canals.

Except in a year of extremely high water, the combined flows from the spills, from Fresno River, and from other streams would not flood the lands described in the petitions of plaintiffs herein.

There is no evidence of any material contributions of water to the San Joaquin River between Friant Dam and the lands described in the petitions of plaintiffs herein other than those described above.

The California Constitution

48. An amendment to the constitution of the State of California, Article XIV, Section 3, approved by the voters on November 6, 1928, reads:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much

178 of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses: *Provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood waters heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

NAVIGABILITY

49. The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 32-36, inclusive, no evi-
179 dence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years

the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.

There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

CLAIM OF J. SHELDON POTTER, No. 46245

50. At all times herein mentioned on and after the 30th day of November 1935, the plaintiff, J. Sheldon Potter, has been and now is, subject to the "conditions, covenants, and reservations" hereinafter set forth, the owner in fee, in the possession and entitled to the possession of all those certain lots, pieces, and parcels of land, together with the appurtenances, situated in the County of Merced, State of California, described in his petition herein, and particularly bounded and described as follows:

A. All of the Swamp and Overflowed Land Surveys Nos. 297, 359, 307, 312, 311, 295, 296, 245, 294, 299, 313, 323, 324, 197, 196, 203, 202 201.

B. All of the South half of Swamp and Overflowed Land Survey No. 298.

C. All of Swamp and Overflowed Land Survey No. 150 lying East of the Easterly line of the East Side Canal & Irrigation Co.'s East Side Canal.

D. All that portion of Swamp and Overflowed Land Survey No. 361 described as follows:

Beginning at the northwest corner of the south half of the southwest quarter of Section 11, Township 9
180 South, Range 12 East, M. D. B. & M. (being portion of Swamp and Overflow Lot 361); thence due East 2639.05 feet to the northeast corner of said south half of the southwest quarter; thence north 0°33½′ West 559.04 feet to the center line of a slough; thence along the center line of said slough the following courses and distances: North 72°02½′ West 170.00 feet; North 0°09′ East 675.00 feet; North 41°15′ West 365.00 feet; North 27°08′ West 355.00 feet; North 61°03′ West 640.00 feet; North 18°49′ West 290.00 feet; North 34°01′ West 217.00 feet; thence leaving slough, South 89°58½′ West 1294.60 feet to the West line of said Section 11;

thence south along the west line of said Section and Swamp and Overflow Land Survey 361, 2,640.00 feet to the point of beginning. Containing 133.25 acres, more or less.

E. All that portion of Swamp and Overflowed Land Survey No. 346, described as follows:

Beginning at the northwest corner of Section 13, Township 9 South, Range 12 East, M. D. B. & M. (said Section 13 being Swamp and Overflow 346); thence South 5280.00 feet to the southwest corner of said Section 13; thence East 5278.65 feet to the southeast corner of said Section 13; thence North 285.00 feet to the center line of a slough; thence along the center line of said slough, the following courses and distances: North 55°53½′ West 305.00 feet; North 33°50′ West 175.00 feet; North 8°48′ West 235.00 feet; North 29°56′ West 225.00 feet; North 54°26½′ West 305.00 feet; North 26°05½′ West 205.00 feet; North 59°41½′ West 185.00 feet; North 6°39′ East 140.00 feet; North 35°30′ West 110.00 feet; North 20°13½′ East 125.00 feet; North 54°07½′ West 335.00 feet; North 18°20½′ West 250.00 feet; North 46°26½′ West 115.00 feet; North 13°38½′ West 430.00 feet; North 5°04½′ West 395.00 feet; North 62°14½′ West 180.00 feet; North 2°33′ East 280.00 feet; North 38°46½′ East 230.00 feet; North 26°20½′ East 205.00 feet; North 20°20′ West 180.00 feet; North 60°48½′ West 110.00 feet; North 87°38½′ West 160.00 feet; North 50°59′ West 175.00 feet; North 77°47½′ West 320.00 feet; South 11°20′ West 185.00 feet; North 81°41½′ West 295.00 feet; North 61°13½′ West 155.00 feet; North 84°58½′ West 185.00 feet; North 64°56½′ West 135.00 feet; North 2°46′ West 155.00 feet; North 38°07½′ West 315.00 feet; North 12°27′ West 120.00 feet; South 86°23½′ West 390.00 feet; South 70°25½′ West 335.00 feet; North 38°52½′ West 260.00 feet; North 27°21′ West 185.00 feet; North 53°51′ West 295.00 feet; North 5°55½′ East 60.70
181 feet to the North line of said section and Swamp and Overflowed Land Survey No. 346; thence West 845.50 feet to the point of beginning, containing 446.40 acres, more or less.

Reserving a thirty-foot road easement along the north line of Survey 346, and along the north line of Survey 296, for use as a public road.

All being in Township 9 South, Range 12 East, M. D. B. & M.

F. Location No. 3288, Swamp and Overflowed Lands in Sections 9 and 16, Township 9 South, Range 12 East, M. D. B. & M., described as follows:

Beginning at ¼ section corner between Sections 8 and 9, Township 9 South Range 12 East, M. D. M., thence East 11.50 chains; thence South 72.90 chains to San Joaquin River, thence down stream North 77° West 3.71 chains; thence South 71¼° West 8.33 chains; thence North 74.75 chains to point of beginning, containing 84.08 acres, more or less.

Subject to:

Right of way for all presently existing roads, highways, telephone, telegraph and electric power and pipe lines, sewers, drainage ditches, canals and other drainage, reclamation and irrigation works, and the easement to maintain, operate, and repair the same.

Said lands containing in the aggregate 6,038.14 acres.

51. J. Sheldon Potter acquired such land from Miller & Lux Incorporated, who by deed dated November 30, 1935, granted and conveyed such land to Potter, together with the tenements, heritaments, and appurtenances thereunto belonging or appertaining. The deed reads in part:

This conveyance is made subject to the following conditions, covenants, and reservations:

(1) To all existing water rights of the Grantor and its subsidiary companies, to wit: The San Joaquin & Kings River Canal & Irrigation Company, Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal Company, San Luis Canal Company, and Santa Rita Irrigation Company, and whether established by appropriation, prescription, or existing contract, and the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor.

(2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it or them, by appropriation or prescription,
182 in or to the waters of the San Joaquin River or its tributaries (Grantor hereby declares that it will never assert as against Grantee, his heirs, successors, and assigns, that an appropriative or prescriptive water right is appurtenant to the land herein conveyed), and to store and or change the place of use of such water, whether within or without the watershed of said river, and such right of storage of such water, the right

to which has already been established by appropriation or prescription, and/or change of place of its use, may be exercised by any purchaser or assignee of said water rights.

(3) The covenants herein contained shall run with and be binding on the land herein conveyed, regardless of the ownership thereof.

It is further understood that the land herein conveyed is part of a larger tract of land belonging to the Grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remaindor of said tract of land retained and owned by the Grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

52. Prior to the execution and delivery of the deed mentioned in finding 51, Miller & Lux Incorporated presented to and requested Potter to accept a deed granting and conveying to him the lands above described, which proffered deed read in part:

Excepting and reserving the following property and property rights:

• • • • •

(d) It is expressly understood and agreed that Grantor reserves the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries; Grantor also reserves the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said River and its tributaries, whether naturally flowing therein or being therein after being stored, and thereafter use such waters for the irrigation of riparian or nonriparian lands within or without the water shed of said river and whether or not owned by Grantor, and for the production of hydroelectric power.

The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their or either of their agencies, any public district, mutual water company, firm, or
183 individual, to which Grantor may hereafter transfer or assign said reserved rights; *Provided, however,* that nothing herein contained shall be construed as limiting the rights of Grantee to make a reasonable use as a riparian owner and in common with lower riparian lands (including that of Grantor) of any waters which may at any time be actually flowing in or through any

slough or branch of said River located on the land herein conveyed.

* * * * *

The rights herein reserved shall constitute an easement in the land herein conveyed, and the covenants herein contained shall run with and be binding on said land.

Potter refused to accept such deed, and thereupon the deed referred to in finding 51 was made, executed, and delivered by Miller & Lux Incorporated to Potter.

53. The decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found with respect to the Potter land:

That swamp and overflow survey No. 359 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 298 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 297 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 361 was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 346 was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 296 in the west half of Section 23 was riparian to Chamberlain Slough, to Mariposa Slough, and to the overflow channel of the river;

That the east half of Section 24 (swamp and overflow survey No. 299) was riparian to Mariposa Slough, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 295 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

184 That swamp and overflow survey No. 311 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 307 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 312 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 245 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 324 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 294 was riparian to Chamberlain Slough, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 323 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 313 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 201 was riparian to the low channel of the river, to the high channel of the river, and to Chamberlain Slough;

That swamp and overflow survey No. 202 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 203 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 196 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 197 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough, and

185 That swamp and overflow survey No. 150 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough and Duck Slough, and to the overflow channel of the river.

54. The Madera Irrigation District contended in the actions described above that Miller & Lux Incorporated had constructed upon certain of its land involved therein, and particularly on the land now owned by J. Sheldon Potter, certain levees along the bank of the river and certain boxes or weirs at the heads of sloughs taking out of the river and traversing such land, and had thereby lost its riparian rights with respect to the flow of the river and such sloughs

and the overflow of such land. The Court adjudicated that all of such works were constructed and maintained for the purpose of regulating the flow of the water of the river and such sloughs by, through, and over such land, and for making the waters more useful and beneficial to such land, and that the construction and maintenance of such works did not affect the riparian rights of Miller & Lux Incorporated or the right of such land to the full flow of the stream.

55. Evidence other than the *Haines* decrees shows that the lands described in the petition of J. Sheldon Potter were and continued to be, as of October 20, 1941, riparian to the channels and sloughs as stated in the *Haines* decrees, except that it does not appear that swamp and overflow surveys Nos. 294 and 296 were riparian to Mariposa Slough, or that swamp and overflow surveys Nos. 197 and 202 were riparian to Sand (Chamberlain) Slough. Duck Slough, referred to in such decrees in connection with swamp and overflow survey No. 150, is not identified by any evidence. The lands in such surveys were, however, riparian to the other channels as stated in the decrees.

56. Each year up to and including 1941, with a few exceptions in years of extreme low water, substantially all such Potter lands were overflowed by the spring floods, and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-
186 Kern Canals will prevent the further overflowing of the Potter lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the Potter land at that time.

57. The difference between the fair market value of the above-described Potter lands on or about October 20, 1941, with riparian rights to the use of the water of the San Joaquin River, and the fair market value without such riparian rights was $54,343.26.

CLAIM OF MARTIN ERRECA, No. 46244

58. At all times herein mentioned on and after October 20, 1937, the plaintiff in case No. 46244, has been and now is, subject to the "exceptions" and "reservations" hereinafter set forth, the owner in fee, in the possession and entitled to the possession of that certain lot, piece, and parcel of land situated in the County of Merced, State of California, alleged in his petition herein, and described as follows:

Beginning at the Southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., thence North 89°25′ East 765.60 feet to the northeast corner of Swamp and Overflow Survey 136 in aforesaid Township and Range, thence along the east line of Swamp and Overflow Survey 136 South 2,701.60 feet, thence down and along the right bank of the San Joaquin River South 43°16′ West 115.60 feet, South 25°02′ West 322.00 feet, South 43°51′ West 246.00 feet, South 58°34′ West 370.00 feet, South 66°26′ West 479.35 feet, South 56°36′ West 150.00 feet, South 36°42′ West 645.00 feet, South 43°45′ West 405.00 feet, South 31°14′ West 180.00 feet, South 53°59′ West 55.00 feet, North 85°24′ West 90.00 feet, North 59°54′ West 200.00 feet and North 32°58′ West 219.50 feet, thence leaving river and running along the southerly right of way line of County Road North 41°56′
187 East 349.75 feet, thence along the arc of a curve to the right of radius 2,262.00 feet, a distance of 325.70 feet, thence North 50°11′ East 1,658.28 feet, thence leaving road North 1°07′ West 2,871.50 feet to the point of beginning, EXCEPTING therefrom a portion of a sixty-foot County Road, the center line of said portion of County Road being described as follows: Beginning at a point which bears South 1°07′ East 2,833.06 feet from the southwest corner of aforesaid Swamp and Overflow Survey 300, thence North 50°11′ East 924.72 feet to the east line of aforesaid Swamp and Overflow Survey 136, total acreage, exclusive of exception, 71.85 acres, more or less.

59. Plaintiff Erreca acquired such land from Miller & Lux Incorporated, who by deed dated October 20, 1937, granted and conveyed it to him. The deed read in part:

EXCEPTING and RESERVING the following property and property rights:

• • • • •

This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the Grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs, and assigns, to the extent herein provided.

It is further understood that the land herein conveyed is part of a larger tract of land belonging to the Grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remainder of said tract of land retained and owned by the Grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

60. At the time of the execution and delivery of such deed, Miller & Lux Incorporated was the owner of large tracts of land riparian and nonriparian to the San
188 Joaquin River and its tributaries, which it had theretofore irrigated with the waters of the San Joaquin River either personally or through subsidiaries and affiliated companies, including mutual water companies in which it owned stock.

At the time of making such deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of all the plaintiffs herein and also had made certain appropriations of water of the river on lands situated above the lands of such plaintiffs, but it owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere, except so far as it had theretofore permitted such storage for power purposes.

61. The decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found with respect to the land involved in this claim that Swamp and Overflow Survey No. 136, of which the parcel here in-

volved is a part, was riparian to the low channel of the river and to Swan Slough.

Evidence other than the *Haines* decrees shows that the tract lies along and on the border of the main channel of the San Joaquin River and has continued to be riparian thereto. Swan Slough has not been identified in the evidence and may have been obliterated by the leveling operations mentioned below. There remains, however, part of an unidentified slough on the tract which conveys the pumped water hereinafter described.

Plaintiff Erreca took possession of the tract in 1934 under a contract to purchase and, prior to 1941, had leveled most of it for the purpose of growing hay, grain, and vegetables. The land, while not hilly or rolling, is uneven to the extent that leveling is necessary for the proper planting and growing of grain, alfalfa, vegetables, and similar crops.

62. Commencing a long time before 1941 this tract was protected by dikes so that, except in years of very high water, it was not subject to flooding other than that permitted under control.

At the times Sack Dam was not in place and the water in the river was in substantial flow, this tract benefited from subirrigation by seepage from the main channel. Plaintiff had installed a pump and, during such time as Sack
189 Dam was not in operation, could and did pump directly from the flow of the river to irrigate the crops on the tract.

When Sack Dam was in place there was substantially no surface flow, but plaintiff was able to pump some water from a pool in a deep hole in the river, where it collected by seepage. This did not provide a steady flow. The pumping would empty the pool and then have to be discontinued until the pool had filled again. Such seepage is not likely to be materially altered by the operation of Friant Dam and the canals, but such operations will completely stop pumping from the spring high waters, except in years of unusually high flow, and will deprive the tract of all benefit from subirrigation.

63. The difference between the fair market value of this tract on or about October 20, 1941, with riparian rights to the use of the water of the San Joaquin River and the fair market value without such riparian rights was $2,500.

CLAIM OF MARTIN ERRECA, ET AL., NO. 46247

64. By three agreements in writing dated, respectively, April 17, 1935, May 12, 1936, and November 1, 1936, Miller & Lux Incorporated, which was at that time the owner of

the land hereinafter described, agreed to sell to Martin Errecа, and he agreed to buy, for the considerations set forth in such agreements, all those certain lots, pieces, and parcels of land situated in the County of Merced, State of California, described as follows:

Parcel No. 1.—Beginning at the southwest corner of Section 30, Township 8 South, Range 12 East, M. D. B. & M., thence along the south line of Section 30, and along the north line of Swamp and Overflow Surveys 315 and 310, north 89°24½′ east 3,496.09 feet to a point on the westerly right of way line of the Eastside Canal, thence along the westerly right of way line of the Eastside Canal, south 16°37′ east 5,579.61 feet to a point on the north line of Swamp and Overflow Survey 316, Township 9 South, Range 12 East, M. D. B. & M., which bears south 89°46½′ west 1,890.31 feet from the northeast corner of Swamp and Overflow Survey 316, thence continuing along the westerly right of way line of the Eastside Canal, south 16°37′ east 67.34 feet, south 22°29½′ east 1,233.80 feet, south 25°59½′ east 863.51
190 feet, south 60°55′ east 522.34 feet, south 23°14′ east 157.88 feet and south 23°18′ west 298.00 feet, thence leaving the Eastside Canal, north 44°19½′ west 234.70 feet, north 67°57′ west 180.00 feet, and south 81°46′ west 269.00 feet, thence along the center line of a levee, south 89°41′ west 300.00 feet, south 85°05′ west 423.00 feet, south 82°21′ west 390.00 feet, south 63°39′ west 95.00 feet, south 31°46′ west 375.00 feet, south 64°21′ west 133.00 feet, south 79°12′ west 260.00 feet, north 84°10′ west 130.00 feet, north 58°15′ west 200.00 feet, north 77°47′ west 90.00 feet, south 83°46′ west 170.00 feet, south 77°50′ west 295.00 feet, south 65°33′ west 225.00 feet, south 39°37′ west 310.00 feet, south 52°50′ west 99.00 feet, south 68°10′ west 120.00 feet, and south 87°12′ west 562.10 feet, thence along the center line of a slough, south 13°38′ east 261.62 feet, south 46°38′ east 536.83 feet, south 33°45′ east 315.60 feet, south 52°01′ east 416.86 feet and south 8°37′ east 704.68 feet to a point on the north line of Swamp and Overflow Survey 300, thence along the north line of Swamp and Overflow Survey 300 (south line of Swamp and Overflow Survey 316) and along the south line of a sixty-foot road easement (hereinafter reserved), north 89°46½′ west 1,377.20 feet, to the northwest corner of Swamp and Overflow Survey 300, thence along the west line of Swamp and Overflow Survey 300 and along the east line of a sixty-foot road easement (hereinafter re-

served), south 0°38½′ east 921.90 feet, thence leaving west line of Swamp and Overflow Survey 300, and road easement, south 89°37½′ west 3,909.70 feet to a point on the east line of the D. L. McNamara property, thence along the east line of the D. L. McNamara property, north 0°22½′ west 3,577.70 feet to the northeast corner of the McNamara property, thence along the line common to Swamp and Overflow Surveys 321, 318, 184, and 322, said line being the north line of the D. L. McNamara property and along the south line of a sixty-foot road easement (hereinafter reserved), north 89°57′ west 4,764.15 feet to a point which bears south 89°57′ east 1,091.75 feet from the northwest corner of Swamp and Overflow Survey 321, thence leaving road easement and running along the east line of the H. B. & L. C. Wolfsen property due north 4,152.22 feet, thence leaving Wolfsen property south 73°35½′ east 1,455.75 feet, south 81° 39½′ east, 1,026.70 feet, south 35°44½′ east 1,177.30 feet to a point on the south line of Swamp and Overflow Survey 116, Township 8 South, Range 11 East, M. D. B. & M., thence along the south line of Swamp and Overflow Survey 116, south 89°17½′ east 1,064.40 feet
191 to a point on the center line of a levee, thence along center line of levee and along the center line of a sixty-foot-road easement (hereinafter reserved), north 1°27′ west 487.10 feet, north 1°44′ east 1,514.00 feet, north 31°45′ west 802.90 feet, north 28°00′ west 1,690.00 feet, north 17°14′ east 82.00 feet and north 49°52′ east 1,618.10 feet to a point on the south line of Section 25, Township 8 South, Range 11 East, M. D. B. & M., which bears north 89°44¼′ east 2,513.45 feet from the southwest corner of said Section 25, thence leaving levee and road easement and running along the south line of Section 25, north 89°44¼′ east 2,753.46 feet to the southeast corner of said Section 25 and the point of beginning. Containing 2,142.00 acres, more or less. A sixty-foot road easement (hereinafter reserved) described as follows: Beginning at a point which bears north 89°46½′ west 60.00 feet from the northwest corner of afore-mentioned Swamp and Overflow Survey 300, in Township 9 South, Range 12 East, M. D. B. & M., thence along the southwesterly line of said sixty-foot road easement, north 55°45′ west 4,674.40 feet to the northeast corner of the D. L. McNamara property in Township 9 South, Range 11 East M. D. B. & M., thence along the west line of said sixty-foot-road easement, north 0°24½′ west 689.00 feet, thence South 81°11½′

east 30.39 feet to the center line of said sixty-foot-road easement, thence along center line of said road easement north 10°01½′ east 4.20 feet, north 10° 15′ east 189.00 feet, north 59°45½′ west 175.00 feet, north 48°43½′ west 628.00 feet, north 23°16′ west 62.00 feet, north 3°21′ west 421.00 and north 1°27′ west 686.90 feet to a point on the center line of a levee, the continuation of said road along the levee being previously described. Reserving all of that portion of aforesaid sixty-foot road easements lying within above described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining land, together with the right to convey said road easements to the County for use as public roads.

Parcel No. 2.—A portion of Swamp and Overflow Survey 316, located in Township 9 South, Range 12 East, M. D. B & M., and being more particularly described as follows: Beginning at the northeast corner of said Swamp and Overflow Survey 316, as located with reference to United States Government Section corners in above described Parcel No. 1, thence along the north line of Swamp and Overflow Survey 316, south 89° 46½′ west 1,681.84 feet to a point on the easterly right of way line of the Eastside Canal; thence along the easterly right of way line of the Eastside Canal south 22°29½′ east 1,215.60 feet, south 25°59½′ east 794.49 feet, south 60°55′ east 527.66 feet, south 23°14′ east 312.12 feet, south 23°18′ west 720.57 feet, south 1°59′ east 785.14 feet, south 32°40′ east 579.38 feet, and south 69°23′ east 258.36 feet to a point on the east line of Swamp and Overflow Survey 316, which bears north 0°09½′ west 869.95 feet from the southeast corner of Swamp and Overflow Survey 316, thence along the east line of Swamp and Overflow Survey 316, north 0°09½′ west 4,412.35 feet to the point of beginning, containing 82.30 acres more or less.

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Parcel No. 3.—Beginning at a point on the line between Swamp and Overflow Survey 317 and Swamp and Overflow Survey 300, in Township 9 South, Range 12 East, M. D. B. & M., which bears south 0°38½′ east 921.90 feet from the northwest corner of Swamp and Overflow Survey 300 as located with reference to United States Government Section Corners in above described Parcel No. 1, thence along the west line of Swamp and Overflow Survey 300, and along the east line of a sixty-foot road easement (hereinafter re-

served) south 0°38½′ east 4,391.76 feet to the southwest corner of Swamp and Overflow Survey 300, leaving road easement, thence south 89°38′ west 1,870.40 feet along the north line of Swamp and Overflow Survey 136 to the corner common to Swamp and Overflow Surveys 320 and 136 in Township 9 South, Ranges 11 and 12 East, M. D. B. & M., thence south 89°49′ west 2,058.80 feet along the north line of Swamp and Overflow Survey 320 to a point, thence along the east line of the D. L. McNamara property, north 0°22½′ west 4,382.60 feet, thence north 89°37½′ east 3,909.70 feet to the point of beginning, containing 394.81 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 4.—Beginning at the southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., which bears south 1°07′ east (south 1°07′ east equal to south 0°38½′ east in Parcel No. 1), 5,313.66 feet from the northwest corner of said Swamp and Overflow Survey 300 as located in above-described Parcel No. 1, thence south 1°07′ east along the east line of a sixty-foot road
193 easement (hereinafter reserved) 2,794.62 feet to a point on the northerly right of way line of a County road, thence along the northerly right of way line of County Road, south 50°11′ west 1,706.68 feet, thence along a curve to the left of radius 2,322.00 feet a distance of 334.34 feet, thence tangent to said curve, south 41°56′ west 333.89 feet, thence leaving County road and running down and along the right bank of the San Joaquin River, north 61°03′ west 160.00 feet, north 35°24′ west, 225.00 feet, north 22°19½′ west 190.00 feet, north 8°07′ west 115.00 feet, north 5°13′ east 150.00 feet, north 36°39′ east 255.00 feet, north 12°23½′ east 580.00 feet, and north 24°55′ west 96.37 feet, thence leaving right bank of the San Joaquin River and running along the line between Swamp and Overflow Survey 320 and Swamp and Overflow Survey 136, north 0°54′ west 2,779.30 feet to the northwest corner of Swamp and Overflow Survey 136, thence north 89°09½′ east 1,870.40 feet (north 89°09½′ east equal to north 89°38′ east for above-described Parcel No. 3), to the point of beginning, containing 157.78

acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 5.—Beginning at the southwest corner of Section 25, Township 8 South, Range 11 East, M. D. B. & M., thence along the line of common to Swamp and Overflow Surveys 63 and 314, due south 2,600.50 feet to the southeast corner of Swamp and Overflow Survey 63, thence along the line common to Swamp and Overflow Surveys 63 and 116, south 89°32½′ west 1,712.90 feet to the northeast corner of the H. B. & L. C. Wolfsen property, thence along the east line of Wolfsen property, due south 1,140.68 feet, thence south 73°35½′ east 1,455.75 feet, south 81°39½′ east 1,026.70 feet, south 35°44½′ east 1,177.30 feet to a point on the south line of Swamp and Overflow Survey 116, thence along the south line of Swamp and Overflow Survey 116, south 89°17½′ east 1,064.40 feet to a point on the center line of a levee, thence along the center line of the levee and along the center line of a sixty-foot road easement (hereinafter reserved) north 1°27′ west 487.10 feet, north 1°44′ east 1,514.00 feet, north 31°45′ west 802.90 feet, north 28°00′ west 1,690.00 feet, north 17°14′ east 82.00 feet and north 49°52′ east 1,618.10
194 feet to the south line of aforesaid Section 25, thence along the north line of Swamp and Overflow Survey 314 and the south line of Section 25, south 89°44¼′ west 2,531.45 feet to the point of beginning, containing 285.54 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 6.—Beginning at the southeast corner of Section 26, Township 8 South, Range 11 East, M. D. B. & M., said point of beginning being the northeast corner of Swamp and Overflow Survey 63, thence along the north line of Swamp and Overflow Survey 63 and along the south line of Section 26, south 89°44¼′ west 5,284.91 feet to the southwest corner of aforesaid Section 26, thence continuing along the north line of Swamp and Overflow Survey 63 and the south line of

Section 27 of aforesaid Township and Range, south 89°44¼′ west 2,643.59 feet to the south quarter corner of aforesaid Section 27 and the northwest corner of Swamp and Overflow Survey 63, thence along the south line of Section 27 and the north line of Swamp and Overflow Survey 64½, south 89°44¼′ west 1,321.10 feet, thence south 0° 13¾′ west 2,635.39 feet to the north line of Swamp and Overflow Survey 205, thence along the line common to Swamp and Overflow Surveys 64½, 63, 205, 304, and 116, and along the north line of the H. B. and L. C. Wolfsen property, north 89° 32½′ east 7,547.07 feet to the northeast corner of the Wolfsen property, thence north 89° 32½′ east 1,712.90 feet to the southeast corner of Swamp and Overflow Survey 63, thence due north 2,600.50 feet to the point of beginning, containing 560.00 acres, more or less.

Parcel No. 7—Beginning at the southeast corner of Swamp and Overflow Survey 316, Township 9 South, Range 12 East, M. D. B. & M., as located with reference to United States Government corners in above-described Parcel No. 2, thence along the east line of Swamp and Overflow Survey 316, north 0°09½′ west 656.04 feet, thence along the westerly line of the East-side Canal, north 69°23′ west 400.42 feet, north 32°40′ west 700.62 feet, north 1°59′ west 864.86 feet north 23°18′ east 381.43 feet, thence leaving canal, north 44°19½′ west 234.70 feet north 67°57′ west 180.00 feet, south 81°46′ west 260.00 feet, thence along the center line of a levee, south 89°41′ west 300.00 feet, south
195 85°05′ west 423.0 feet, south 82°21′ west 390.0 feet, south 63°39′ west 95.0 feet, south 31°46′ west 375.0 feet, south 64° 21′ west 133.0 feet, south 79°12′ west 260.0 feet, north 84°10′ west 130.00 feet, north 58°15′ west 200.0 feet, north 77°47′ west 90.0 feet, south 83°46′ west 170.0 feet, south 77°50′ west 295.0 feet, south 65°33′ west 225.0 feet, south 39°37′ west 310.0 feet, south 52°50′ west 99.0 feet, south 68°10′ west 120.0 feet, south 87°12′ west 562.10 feet, thence along the center line of a slough, south 13°38′ east 261.62 feet, south 46°38′ east 536.83 feet, south 33°45′ east 315.60 feet, south 52°01′ east 416.86 feet, south 8°37′ east 704.68 feet, thence along the south line of Swamp and Overflow Survey 316 and the south line of a sixty-foot road easement (hereinafter reserved) south 89°46½′ east 3,851.96 feet, thence leaving road south 89°46½′ east 74.60 feet to the point of beginning, containing

224.46 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining land, together with the right to convey said road easement to the County for use as a public road.

At all times since such dates, Martin Erreca and his successors have been in possession and are entitled to possession of such lands.

65. Thereafter and on the 7th day of June 1938, said plaintiff Martin Erreca, by mesne conveyances, assigned an undivided one-half interest in said contracts to one Thomas J. Gavin in consideration of the assumption by the assignee of one-half of the purchase price of said lands. Thereafter, said Thomas J. Gavin died and after due and regular proceedings in the matter of his estate, the Superior Court of the State of California, in and for the County of Santa Clara, duly gave and made its order appointing Bernard F. Gavin and George D. Coleman, administrators of his estate, and they duly qualified as such administrators and ever since have been and now are the duly appointed, qualified, and acting administrators of said estate.

66. On March 12, 1942, Bernard F. Gavin and George D. Coleman, as such administrators, made, executed and delivered to Martin Erreca, their deeds whereby they conveyed to him all the interest of the estate of Thomas J. Gavin in such contracts for the purchase of such lands.

196 67. On March 19, 1942, Miller & Lux Incorporated, made, executed, and delivered to Martin Erreca their deed whereby they conveyed to him the lands described in such agreements to sell.

68. On April 8, 1942, Martin Erreca and his wife made, executed, and delivered to John Erreca parcels 1 and 2 of such lands.

69. On August 26, 1943, Martin Erreca made, executed and delivered to John Erreca, an instrument in writing, whereby he assigned to John Erreca a 21/32nds interest in and to his claim, demand, and cause of action against the United States for compensation for the taking of water of the San Joaquin River by reason of the construction of Friant Dam, and further agreed to prosecute an action for the recovery of such compensation for his own use and benefit and for the use and benefit of John Erreca.

70. On August 31, 1943, Bernard F. Gavin and George D. Coleman, as administrators of the estate of Thomas J.

Gavin, made, executed, and delivered to Martin Erreca and John Erreca, an instrument in writing whereby they assigned to Martin Erreca 11/32nds and to John Erreca 21/32nds in their claim against the United States for the taking of water of the San Joaquin River, as against the land here involved, in connection with the construction of Friant Dam.

71. The agreements of sale, referred to in finding 64, dated April 17, 1935, and May 12, 1936, which covered parcels numbered 1, 2, and 7, as described in such finding, contained the following provision, referred to therein as an "exception" or "reservation":

> The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein or being therein after being stored or used by third persons at any point or points above the land herein agreed to be conveyed and use the same
> 197 for the irrigation of riparian or nonriparian lands and/or for production of hydroelectric power. The rights herein reserved may be transferred to and exercised by any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The agreement of sale referred to in finding 64, dated November 1, 1936, which covered parcels numbered 3, 4, 5, and 6, as described in such finding, contained the following provision, referred to therein as an "exception" or "reservation":

> The land above described is riparian to Mariposa Slough and other sloughs, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller) of any water which may at any time be actually flowing in said Sloughs as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of

the San Joaquin River and its tributaries, whether naturally flowing therein or being therein, after being stored or used by third persons at any point or points above the land herein agreed to be conveyed, and use the same for the irrigation of riparian or nonriparian lands, whether within or without the watershed of said River, and/or for the production of hydroelectric power. The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their agencies, any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The same provisions, except for designation of the parties, were repeated in the deed of March 19, 1942, referred to in finding 67.

72. At the time of entering into the agreements Miller & Lux, Incorporated, was the owner of large tracts of land riparian and nonriparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River. At such time Miller
198 & Lux, Incorporated, was subdividing its land for sale in small parcels and intended to provide for the future irrigation of such land with the rights which it then owned by means of public districts, private or mutual water companies, firms, or individuals to which it might assign said rights. At the time of entering into such agreements Miller & Lux, Incorporated, owned certain lands riparian to the San Joaquin River situated above the lands of all the plaintiffs herein, and also had made certain appropriations of water of the river on lands situated above the lands of such plaintiffs, but it owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere.

73. The decision in *Miller & Lux, Incorporated*, v. *Madera Irrigation District et al.*, No. 25729, found with respect to the land involved in the case of Martin Erreca, No. 46247:

That the land in Section No. 34, Township 8 S., Range 11 E. (swamp and overflow survey No. 64½ and part of swamp and overflow survey No. 63), was riparian to Mariposa Slough and the overflow channel of the river;

That the land in Sections Nos. 35 and 36, Township 8 S., Range 11 E. (Swamp and overflow surveys Nos. 116 and 314 and part of swamp and overflow Survey No. 63), was riparian to Mariposa Slough and the overflow channel of the river;

That the land in Sections Nos. 1 and 12, Township 9 S., Range 11 E. (in swamp and overflow survey No. 318), was riparian to Swan Slough and to the overflow channel of the river;

That the land in Sections 1 and 2, Township 9 S., Range 11 E. (in swamp and overflow survey No. 184) was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow location 3318, and swamp and overflow surveys Nos. 319 and 316 were riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 317 was riparian to the low channel of the river, to the high channel of the river, to Swan Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 136 was riparian to the low channel of the river, to the high channel of the river, to Swan Slough, and to the overflow channel of the river.

199 Evidence other than the *Haines* decrees shows that the lands described in finding 64 were continued to be riparian to the channels and sloughs of the San Joaquin River, as stated in the *Haines* decrees.

74. The lands involved in this claim were originally grasslands subject to the uncontrolled overflow of the San Joaquin River. During the period in which it owned the lands, Miller & Lux Incorporated commenced a program of bringing the lands under cultivation by building levees or dikes where required along the river and the sloughs to confine and control the flow of the water therein, and by leveling the land.

When plaintiff Erreca came into possession of the lands, he leveled and brought under cultivation additional acreage thereof, so that in 1941 approximately 70 percent was leveled land on which crops were grown. The remainder was pasturage.

75. During the spring floods seasons, hereinabove described, the San Joaquin River water flows down the main channel past the Erreca land and through the sloughs across such land. Except in a year of extreme high flow, it is confined to the main channel and to the sloughs by means of levees or dikes and does not overflow the land. When the water is high in the main channel and in the sloughs, it seeps therefrom for a distance of approximately one-half mile. Plaintiff Erreca has promoted such seepage by the placing of checkdams in sloughs. During the years when there is no high water the crops are poor, but when there is high water the crops are good. Winter rains start the growth of pasturage, but the seepage is necessary to continue the

growth. About two-thirds of the land is adversely affected when there is no seepage. For these reasons the land derives benefit from the spring floods of the San Joaquin River.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further subirrigation of the Erreca lands during the spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river
200 was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to subirrigate the Erreca lands at that time.

76. The southernmost slough on the land involved in this claim, not identified in the evidence by name, carries San Joaquin River water through a siphon under the East Side Canal and thence across such land. However, the greater portion of the San Joaquin River water which crosses such land is taken from the river by Chamberlain Slough. At the eastern side of the lands involved in this claim the East Side Canal intersects Chamberlain Slough, and for about a mile, utilizes its channel (finding 8). Where the artificial channel of the canal resumes and Chamberlain Slough veers to the west, there is a structure known as Big Sand Spillway containing a gate which permits water to be diverted from the slough down the artificial channel of the canal or to be spilled into the continuation of the slough, or both, as existing conditions may require. About a half-mile farther down the canal a similar structure known as Little Sand Spillway provides an outlet for water into the continuation of Mariposa Slough which is also intersected by the canal. Mariposa Slough continues across the Erreca land as hereinabove described. Farther down the canal small streams flow into the canal from the east and, in times of low water when substantially no San Joaquin River water is flowing into the canal, the discharge from these streams reverses the flow in the canal and water from such east side stream tends to flow toward the river from the intersection with such streams.

Defendant contends that the water which spills into Chamberlain and Mariposa Sloughs from the canal and thereafter crosses the Erreca lands is water from the east side streams, either in whole or in part. Defendant

further contends that plaintiff Erreca has failed to sustain the burden of proving what portion of the water so spilled is San Joaquin River water whose flow is affected by Friant Dam, and what portion is east side stream water whose flow is not affected by Friant Dam.

201 Defendant further contends that the spill from the East Side Canal is permissive on the part of the owner of the East Side Canal and that plaintiff has no right to the continuation of such spills.

The evidence shows that during the periods of spring flood water, (a) the water which spills through the Big Sand Spillway and the Little Sand Spillway is from the San Joaquin River and is not from the east side streams; (b) the water flowing into the canal from the San Joaquin River exceeds the East Side Canal's appropriation and the capacity of the area served by the canal to utilize the water at that time; and (c) the volume of flood water is more than the canal can contain and convey to its service areas. Normally, reversal of the east side stream water in the reach under consideration does not take place until the flow of the San Joaquin River begins to drop at the end of the spring flood, at which time the owners of the canal throw a temporary earth dam across the canal which prevents the east side stream water from flowing back to the canal to the spillways above the lands of plaintiffs Erreca and Gerlach.

CLAIM OF GERLACH LIVE STOCK COMPANY, A CORPORATION
No. 46009

77. At all times here involved Gerlach Live Stock Company was and now is a corporation organized and existing under the laws of the State of California, with its principal place of business at Stockton, California.

78. On June 20, 1935, Miller & Lux Incorporated was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

All of Section 16; north half, and north half of southeast quarter of Section 21; north half, north half of south half, and southeast quarter of southeast quarter of Section 22; east half of northeast quarter of Section 27; all in Township 8 South, Range 11 East, M. D. B. & M., containing 1,640 acres.

79. On June 20, 1935, Miller & Lux Incorporated made, executed, and delivered to Edward P. Waltz a deed by which it granted and conveyed such land to Waltz. The deed contained the following provision:

202 Excepting and reserving the following property and property rights:

d. This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary, and affiliated companies, against the grantee, his heirs, and assigns to the extent herein provided.

e. It is furthe understood that the land herein conveyed is part of a larger tract of land belonging to the grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remainder of said tract of land retained and owned by the grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

80. On February 25, 1937, Waltz made, executed, and delivered to Gerlach Live Stock Company a deed by which he granted and conveyed such land to such company.

81. On May 9, 1942, Gerlach Live Stock Company made, executed, and delivered to C. A. Crane, a deed by which it granted and conveyed such land to Crane.

82. On May 12, 1942, Crane made, executed, and delivered his deed to Strathearn Bros., a copartnership consisting of R. P. Strathearn, J. L. Strathearn, Geo. P. Strathearn, and David L. Strathearn, whereby he granted and conveyed such land to such partners.

83. On March 18, 1943, Gerlach Live Stock Company assigned in writing to Strathearn Brothers all its right, title, and interest in and to all claims, causes of action, and demands against the United States for compensation for the taking of water, as against such lands, by reason of storage and diversion at Friant Dam.

203 84. With respect to the land involved in this claim, the decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found that all such land was riparian to Mariposa Slough and to the overflow channel of the river.

Evidence other than the *Haines* decrees shows that the Gerlach lands, described in finding 78, were and continued to be as of October 20, 1941 riparian to the overflow channel of the San Joaquin River, and that all thereof, except the north half of the southeast quarter of section 21, were riparian to Mariposa Slough or its branch channels.

85. Such lands were valuable chiefly for the grazing of cattle. All, except approximately three-quarters of section 16, were good grasslands which were overflowed by the high water from the San Joaquin River during the spring flood season in all years except those of very low water and benefited therefrom. Such overflow prompted the growth of grass for the summer and fall cattle feeding.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of the Gerlach lands by the spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the Gerlach land at that time.

86. Defendant contends that the water which reaches such land comes through Mariposa Slough (also referred to as Deep Slough) and is composed of water from Owens Creek, which is not affected by the Friant Dam, as well as of water from the San Joaquin River. The Gerlach lands have no right to the use of the Owens Creek water.

In a state of nature Owens Creek emptied into Deep Slough upstream from the Gerlach lands and downstream from the line of the East Side Canal. Since the
204 construction of the canal, a structure known as Three *Bridges Spillway was built on the north side of the* canal where the canal intersects Owens Creek. A gate in the structure permits the release of water from the canal into the bed of the creek on the downstream side, or the confinement of water to the canal, or both, as existing conditions may require. Water from Owens Creek mingles with San Joaquin water in the canal, and it is probable that during the spring floods some of the mingled Owens Creek water is released through the spillway and becomes a part of the waters overflowing from Mariposa (or Deep) Slough onto the Gerlach lands. During the spring floods the volume

of San Joaquin River water reaching Mariposa Slough and its branches below the East Side Canal is large enough to overflow the Gerlach lands without the addition of the Owens Creek water. During the higher stages the San Joaquin River water also backs up a branch slough and floods such land from the southwestern corner of section 21. This flooding meets the flooding from Mariposa Slough and there is no evidence to indicate what area it would cover if there were no floods from the Mariposa Slough.

During the spring floods, the release of water at Three Bridges Spillway was not permissive on the part of the owner of the East Side Canal, but the release was made from necessity for the same reasons stated in finding 76 with reference to Little Sand and Big Sand Spillway.

87. On October 20, 1941, the difference between the fair market value of the Gerlach lands described in finding 78 with riparian rights to the use of the water of the San Joaquin River and the fair market value without such riparian rights was $10,440.00.

88. As of October 8, 1945, the certification date of the title report in evidence herein, the lands involved in this claim were subject to the lien of a deed of trust dated November 1, 1944, to secure payment of the sum of $36,000 to the Equitable Life Assurance Society of the United States, with provision for future advances. The evidence does not disclose whether any such advances were made or what, if any, payments have been made on such indebtedness.

205 THE DIVERSIONS THROUGH THE EAST SIDE CANAL

89. About 1887, the predecessors of the East Side Canal & Irrigation Company, a corporation, constructed the canal described in finding 8 and a diversion dam across the San Joaquin River immediately below the head thereof. It diverted San Joaquin River water by that means and filed a notice of appropriation therefor. Since that time water of the river has been diverted into the canal, either at the head, or from Chamberlain Slough, or from Mariposa Slough, or from all such sources. By virtue of such diversions and notice, the East Side Canal & Irrigation Company and Stevinson Water District assert the ownership of an appropriate right of 245⅞ cubic feet per second and have filed the case of *East Side Canal & Irrigation Company et al.*, No. 42666, in this Court, to recover compensation for the alleged taking of such right by the United States through the construction and operation of Friant Dam. Plaintiffs in these four cases concede the existence and

validity of such a right, but defendant contends that no such right was in existence on October 2[illegible], 1941, or for a long time prior thereto.

The canal and its head are downstream from the Potter lands and the alleged appropriate right does not affect the Potter riparian rights. The canal and its head are upstream from the lands involved in the *Gerlach* and the two *Erreca* cases, and the alleged appropriative right, if valid and existing, is prior to the riparian rights of those lands.

Because of the fact that such lands are benefited only by the spring flood overflow, which the East Side Canal cannot prevent from reaching and benefiting such lands (findings 75-76, 85-86), no findings are here made relative to the numerous detailed facts which are material to a determination of the existence and validity of the appropriate right claimed by the East Side Canal & Irrigation Company and Stevinson Water District.

The quantity of water which might be diverted under the full right claimed would alter the aggregate amounts stated in findings 22-31, but not enough to materially affect the spring flood in its relation to the overflow of the lands involved herein.

206 CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca, in the sum of $2,500.00; and in favor of Gerlach Live Stock Company, in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four percent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff J. Sheldon Potter, in the sum of fifty-four thousand three hundred forty-three dollars and twenty-six cents ($54,343.26); in favor of Martin Erreca in the sum of two thousand five hundred dollars ($2,500.00); and in favor of Gerlach Live Stock Company in the sum of ten thousand four hundred forty dollars ($10,440.00). On each of the judgments compensation for delay in payment will be computed at four (4) percent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs in these suits seek to recover just compensation for the taking of the water rights which they claim they had as the owners of land riparian to the San Joaquin River or one of its sloughs. This has been done, if at all, by the construction of the Friant Dam on the San Joaquin River upstream from plaintiffs' lands. The purpose of the constructions of this dam is the diversion of the waters of the San Joaquin River from their present course into the Madera Canal and the Friant-Kern Canal. When the project is completed plaintiffs' lands will be wholly deprived of the water of the river which they now enjoy to a limited extent. It is for the deprivation of the use of this water that they sue.

207 1. Defendant defends, first, on the ground that the San Joaquin River is a navigable stream and that the erection of the Friant Dam was to improve navigation and for flood control, and hence, that it is not liable for the taking of property resulting from its erection.

Defendant says Congress has stated that the "entire Central Valley Project * * * is declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage, and for the delivery of the stored waters thereon, for the reclamation of arid and semiarid lands, and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertaking, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes." Since one of the purposes was to improve navigation, defendant says it is immune from liability for the taking of plaintiffs' water rights as a result of carrying out the plan.

By this declaration Congress did say that a part of the purpose of the Central Valley Project was to improve navigation, although it also said that it had a number of other purposes in mind in the adoption of this plan. However, even though the improvement of nevigation was one of the purposes of the over-all plan, the erection of the Friant Dam, of which plaintiffs complain, was admittedly for the sole and only purpose of irrigating arid or semiarid lands, and perhaps also flood control. Instead of improving navigation on the San Joaquin River the erection of this dam destroyed any possibility of navigation on the upper reaches of the river.

The Central Valley of California is about 450 miles long. The northern two-fifths of it is known as the Sacramento Valley, and the southern three-fifth as the San Joaquin Valley. The northern part is drained by the Sacramento River and the southern part by the San Joaquin River. The project contemplated the construction of the Kennett Dam on the Sacramento River, a part of the purpose of which was the improvement of navigation on that river, but this was the only part of the entire project that could
208 be said to have been in aid of navigation. Certainly the erection of the Friant Dam had no relation to the improvement of navigation on either the San Joaquin or the Sacramento River, but had for its purpose the irrigation of certain lands nonriparian to that river. The effect of the erection of this dam was to make the San Joaquin River throughout its course less navigable than it had been before, and for many miles on the upper reaches of the river it converted it into a dry river bed.

When the case of plaintiff, Gerlach Live Stock Company, was before us on demurrer we said (102 C. Cls. 392):

> There is nothing in the Acts nor in the documents referred to that negative the allegation of plaintiff's petition that the purpose of the construction of this dam was solely to irrigate certain nonriparian lands. If this be true, and if the waters of this river have been diverted from plaintiff's lands, as alleged, there has been a taking under the Fifth Amendment.

The proof now shows without controversy that the purpose of the construction of this dam was to irrigate certain nonriparian lands, and not in aid of navigation. If this is so, defendant is not immune from liability for property taken in carrying out the project. Cf. *Kansas* v. *Colorado*, 206 U. S. 46, 85 *et seq.*; *Horstmann Co.* v. *United States*, 257 U. S. 138.

But defendant says that it was a part of defendant's purpose in the erection of this dam to control floods and that such flood control is within the power granted the Federal Government, for the exercise of which it is not liable in damages. It is true that the erection of the dam was for the purpose of conservation of the water and the prevention of its running down into the sea in times of floods or high waters. However, the purpose of this flood control was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands.

The Supreme Court did not hold in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, that the Federal Government is immune from liability for acts done to con-

trol floods where the only purpose of such control was the irrigation of arid lands.

209 We are of opinion that the defendant is liable for the taking of whatever rights plaintiffs may have had to the water of this river.

2. Plaintiffs claim the rights of riparian owners. The testimony shows that their lands were riparian to the San Joaquin River or some one or more of the sloughs thereof. Defendant's exhibit 13 and plaintiffs' exhibit 55 indicate that the lands of plaintiff Potter were riparian to the San Joaquin River, Chamberlain Slough and Mariposa Slough. They also indicate that the lands of Martin Erreca *et al.* were riparian to the Chamberlain and Mariposa Sloughs and to the San Joaquin River itself, and that the lands of Martin Erreca, sole, were riparian to the San Joaquin River, and that the lands of the Gerlach Live Stock Company were riparian to Deep Slough and certain other unnamed sloughs. Additional evidence in the record, including the testimony of witnesses to the actual overflow of the lands by the waters of the river and these sloughs, leaves no doubt in our minds that they were riparian to the rivers and sloughs except for a small portion of the lands of the Gerlach Live Stock Company. We have found this to be a fact.

Honorable Charles C. Haines, judge of the Supreme Court of the State of California, made findings of fact and conclusions of law on December 31, 1932, and on January 4, 1933, holding that plaintiffs' lands, among others, were riparian to the San Joaquin River or some one of its sloughs. These findings were in the cases of *Miller & Lux, Inc.*, v. *Madera Irrigation District; San Joaquin and Kings River Canal and Irrigation Co.* v. *Madera Irrigation District, Inc. and San Luis Canal Co.* v. *Madera Irrigation District, et al.* The decrees following these findings are known in the record as the "Haines decrees." Nothing has happened, so far as the record shows, since these decrees were entered that has materially changed the situation with respect to these lands.

While, of course, in the suits at bar the parties are not bound by these decrees, still they are highly persuasive.

Plaintiffs' riparian rights, however, were subject to prior appropriate and prescriptive rights of Miller & Lux, Inc., and its subsidiaries, The San Joaquin & Kings River Canal & Irrigation Company Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Colum-

210 bia Canal Company, San Luis Canal Company and Santa Rita Irrigation Company, and other upstream diverters. These companies had constructed certain canals

through which they had diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands, both riparian and nonriparian, owned by Miller & Lux, Inc., and other persons. In addition, Miller & Lux, Inc., had granted to the Southern California Edison Company and San Joaquin Light & Power Corporation the right to construct dams and reservoirs above the site of Friant Dam for the production of electric power. Plaintiffs' water rights were subject to these prior rights. The result was that plaintiffs' lands benefited only from the flood waters of the river.

However, notwithstanding these superior rights, there was left in times of high water sufficient additional water to overflow the lands of the plaintiffs or, by seepage, to raise the water level underneath their lands. The result was that by overflows and by seepage the lands of the plaintiffs were moistened and enriched and made more productive. The erection of the Friant Dam took these rights from plaintiffs. Plaintiffs' right to compensation is limited to their rights to have their lands moistened and enriched in these times of high water.

The defendant contends that the overflow of these lands did not in fact enrich them, but we think the evidence is to the contrary.

3. When the defendant decided upon the erection of the Friant Dam and the extinguishment of the riparian water rights of riparian owners downstream, it entered into contracts with Miller & Lux, Inc., and its subsidiaries, who diverted water for irrigation of the lands of others, and who also owned large acreages both riparian and nonriparian to the San Joaquin and its sloughs which were suitable for the raising of crops, and also certain grasslands which were watered by controlled irrigation, and grasslands which were not watered by controlled irrigation, but which were subject to overflow or seepage in times of high water. The contracts guaranteed to Miller & Lux the same amount of water they had previously enjoyed for the irrigation of their crop lands and controlled grasslands. The
211 rights of their uncontrolled grasslands to the excess water in times of high water were, however, to be appropriated by the defendant and paid for by it.

The parties agreed on a price of $9.00 an acre as the difference in the market value of the uncontrolled grasslands before and after the taking of these water rights. The total amount agreed to be paid for all such rights was $2,450,000. Miller & Lux, however, had sold to plaintiffs, and perhaps others, certain portions of their lands, and it was questioned whether a part of the sum to be paid might not properly

be payable to the grantees rather than to Miller & Lux, and so, it was agreed that $71,350.00 of the total sum should be placed in escrow, and should be used to reimburse the defendant for any judgments that might be recovered by the grantees of Miller & Lux, or their successors, for the deprivation of the riparian water rights appurtenant to these lands, limited, however, to $9.00 an acre for the uncontrolled grasslands. The balance was to be paid to Miller & Lux.

(a) The uncertainty as to whether or not Miller & Lux or the grantees were entitled to recover for deprivation of the water rights appurtenant to the lands conveyed was due to reservations contained in the deeds to these lands from Miller & Lux. These reservations differ in their terms. The reservation to plaintiff Potter reads in part as follows:

> The conveyance is made subject to the following conditions, covenants, and reservations:
>
> (1) To all existing water rights of the Grantor and its subsidiary companies * * * whether established by appropriation, prescription or existing contract, and the right of the Southern California Edison Company, Ltd., and the San Joaquin Light & Power Company to store the water of the San Joaquin River under existing contracts with the Grantor.
>
> (2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it to them, by appropriation or prescription, in or to the waters of the San Joaquin River or its tributaries * * * and to store and/or change the place of use of such water, whether within or without the watershed of said river, and such right of storage of such water, the right to which has already been established by appropriation or prescription, and/or
212 change of place of its use, may be exercised by any purchaser or assignee of said water rights.

Inasmuch as the deed to Potter was subject only to the "existing water rights" of Miller & Lux, and they did not have the right to store water at Friant Dam, it seems plain that plaintiff Potter, and not Miller & Lux, is entitled to recover from the defendant the value of the water rights appurtenant to the Potter lands, of which he was deprived by the erection of the Friant Dam.

This seems all the more clear since Miller & Lux at first offered to plaintiff Potter a deed, rejected by Potter, reading in part as follows:

> Excepting and reserving the following property and property rights:
>
> * * * * * *

(d) It is expressly understood and agreed that Grantor reserves the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries; Grantor also reserves the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said River and its tributaries, * * * and thereafter use such waters for the irrigation of riparian or non-riparian lands within or without the water shed of said river and whether or not owned by Grantor, and for the production of hydroelectric power.

The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their or either of their agencies. * * *

Under such a reservation Miller & Lux would probably have had the right to transfer to defendant the right to subordinate the Potter lands to such storage and diversion, but this proposal was rejected by plaintiff Potter and a deed reserving only existing water rights was agreed upon. Such existing water rights did not include the right to impound water at Friant Dam and to deprive lower riparian land owners of their rights to water during freshets and floods.

(b) The deed to a part of the Martin Erreca *et al,* lands contained a reservation reading in part as follows:

The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a
213 reasonable use as a riparian owner and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert and use all or any part of the waters of the San Joaquin River and its tributaries * * * at any point or points above the land herein agreed to be conveyed and use the same for the irrigation of riparian or non-riparian lands, and/or for production of hydroelectric power. The rights herein reserved may be transferred to and exercised by any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights.

The reservation in the deeds to the remainder of the lands conveyed to these plaintiffs was to the same effect, except that the seller reserved the right to store, impound, and divert the waters of the San Joaquin River for the irriga-

tion of riparian or nonriparian lands, whether or not such lands were within the water shed of said river. The reservation also expressly provided that the rights might be conveyed to the United States of America, in addition to the other persons named in the reservation above quoted.

Plaintiffs Martin Erreca *et al.* insist that it was intended by these reservations to reserve only such rights as Miller & Lux had at the time the deeds were executed.

At the time the deeds were executed Miller & Lux had acquired the right to divert at points above the land conveyed and to use a part of the waters of the San Joaquin River and to use these waters for the irrigation of riparian and nonriparian lands, and they evidently intended to retain these rights notwithstanding the conveyance to plaintiffs Martin Erreca *et al.* But the reservation went further than this. It not only reserved the right to divert the water which they had already been diverting, but they further reserved the right to "store, impound, divert and use all or any part of the waters of the San Joaquin River * * *."

The concluding sentence of the reservation, not quoted above, reads:

> These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

214 It would seem, therefore, that Miller & Lux, Inc., intended to do something more than merely reserve their existing rights. Prior to the reservation Miller & Lux had the right to divert water from the stream, but it did not have the right to store and impound it.

Before the execution of this deed they had the right to divert something like 1,450,000 acre-feet of water out of a total of something like 1,811,000 acre-feet, which seems to have been close to the annual average flow of the river. They had not, however, acquired the right to divert the excess of something like 350,000 acre-feet; but in the deed they reserved, as against the grantee, the right to appropriate "all or any part" of the waters of the river, and it was provided that the rights so reserved should be an easement on the land conveyed and the riparian rights thereof; that is to say, the riparian rights in the lands conveyed should be exercised in subordination to the right of Miller & Lux to appropriate the balance of the water of the river, not only the water already appropriated, but, in addition, "all" the water of the river.

The condition of the deed reads, the grantor "reserves" the right. This word means to keep or retain; that is to say, to keep what one already has. You do not reserve a right

which you do not possess. However, when we take into consideration that the reservation went beyond the existing rights of Miller & Lux and that it provided that the rights reserved should be an easement on the lands conveyed and the riparian rights thereto, we think it must be concluded that the grantor had in mind not only retaining the rights it had already acquired, but also the right, as against the grantee, to appropriate additional water in the river—"all" the water.

(c) The reservations in the deed to Martin Erreca, sole, and to the Gerlach Live Stock Company are identical in their terms. They read in part:

> Excepting and reserving the following property and property rights:
>
> * * * * * *
>
> This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * whether such water rights be riparian, appropriative, or perscriptive, to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, * * * against the Grantee, his heirs and assigns, to the extent herein provided.

By this exception it was plainly intended to reserve to the grantor its existing water rights. Whether or not they intended to go further than this depends upon the proper construction to be given the clause reading: "including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns.

Prior to the execution of this deed Miller & Lux had granted to two hydroelectric companies the right to store water on the upper reaches of the San Joaquin River for the purpose of generating electricity. A part of the purpose of the reservation was no doubt to convey the lands subject to the right granted these companies. The language is also susceptible of the construction that the grantor intended also to reserve the right to enter into such contracts in the future. But we do not think it is necessary to determine whether or not the parties had in mind future contracts

as well. Whether or not the parties had in mind future contracts, nevertheless the extent of the reservation was "to contract for or permit *storage* on the upper reaches of the San Joaquin River." The right was not reserved to contract or to permit *diversion* of the waters of the river, as had been done in the reservation in the deed to the lands in Martin Erreca, *et al.*

What the United States has done that has caused the damage to plaintiffs' land is the *diversion* of the waters. It may be that under the reservation in the foregoing deed and under the contracts between defendant and Miller &
216 Lux defendant is protected from liability for the *storage* of the waters of the San Joaquin River, but there is nothing in the deed which permits it to completely *divert* the water from plaintiffs' lands. This is the thing that causes the decrease value of the lands.

The reservation expressly says that it "shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor * * *." In other words, grantee was estopped to complain of the fact that the grantor had entered into a contract to permit *storage* of the water; but he was not estopped to complain of the *diversion* of the waters from his lands. This right to the flow of the water he had as a riparian owner and the contract recites that riparian rights are not extinguished.

For the taking of this right by defendant we think plaintiffs Martin Erreca and Gerlach Live Stock Company, as well as plaintiff Potter, are entitled to recover; but we are of opinion that under the reservations in the deed in the case of Martin Erreca *et al.* plaintiffs are not entitled to recover.

Miller & Lux, Inc., has filed an intervening petition contesting the right of plaintiffs to recover, but it does not seek a judgment against the defendant and, hence, we do not consider whether or not it is entitled to judgment.

4. Defendant further says that plaintiffs have no right to recover because plaintiffs could not use the flood waters of the river without wasting them, and that such use was prohibited by the amendment to the California Constitution adopted in 1928. This amendment, being article XIV, section 3, reads as follows:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation

of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for
217 the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses: *Provided, however,* That nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Defendant says that this article of the California Constitution preserves in a riparian owner the right to use the waters of the stream to which his lands are riparian, but only to the extent that he can beneficially use them and without unnecessary waste of them. It says that plaintiffs cannot use the flood waters of the San Joaquin River without wasting them, and that since they are prohibited from wasting them, and they cannot use them without doing so, they have lost all their right to them.

Plaintiffs do not admit that their present use of these waters is wasteful; they say it is not wasteful to allow them to flow over their lands and then on to the lower riparian lands, before finally reaching the sea. They say that such a use of them benefits the lower riparian lands, and, in addition to this, they say the flood waters retard the encroachment of the salt water on the lands in the delta of the San Joaquin and Sacramento Rivers, and so benefits those lands. They further say that prior to the passage of the Constitutional Amendment they had a vested right for these waters to flow over their lands and that it was not intended to take these rights away from them. They say that one who would interfere with the customary use by a riparian owner must provide some physical solution to enable him to continue to receive his water and that he has no right to divert it and appropriate it without doing so.

218 It seems clear that the amendment to the California Constitution does not go as far as the defendant claims. The California cases hold that the mere fact that as the result of rainstorms and resulting floods, or of melting snows, or of natural flow otherwise, a large volume of water flows on to the sea, unused, wasted, and lost, does not permit a subsequent appropriator to disregard the rights of riparian owners, prior appropriators and overlying landowners to all of the waters of the stream which they can put to reasonably beneficial use under reasonable methods of use. If under these circumstances one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. *Peabody* v. *City of Vallejo*, 2 Cal. (2d) 351, 40 P. (2d) 486; *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. (2d) 316, 60 P. (2d) 439; *Hillside Water Co.* v. *City of Los Angeles*, 10 Cal. (2d) 677, 76 P. (2d) 681; *City of Los Angeles S. Aitken*, 10 Cal. App. (2d) 460, 52 P. (2d) 585; *Los Angeles Flood Control District* v. *Abbot*, 24 Cal. App. (2d) 728, 76 P. (2d) 188.

It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use.

The defendant by its acts has recognized that the owners of these lands were entitled to some use of the waters of this river. On July 27, 1939, it entered into a contract with Miller & Lux, the former owner of plaintiffs' lands, under which the defendant agreed to pay to Miller & Lux $9.00 an acre in compensation for the taking of the water

219 rights appurtenant to their uncontrolled grasslands which were riparian to the San Joaquin River and the sloughs thereof, including plaintiffs' lands. There was no determination as to what these water rights were, but it was recognized by this agreement that Miller & Lux did have some water rights on account of their ownership of these lands, and in order to com-

pensate them for the taking of these rights the defendant agreed to pay them $9.00 an acre, a portion of the amount to be placed in escrow to be paid to whatever person might be entitled thereto.

This was a recognition on the part of defendant that plaintiffs' rights were worth at least this much. It has actually placed the money in escrow for the rightful claimant and it certainly cannot complain at a judgment for that amount.

Plaintiffs, of course, are not limited to a recovery of this amount if they have been able to show that the value of their lands has declined a greater amount, but we do not think they have done so. On all the evidence we are convinced that this represents just compensation. Miller & Lux and defendant thought so, and we think they were right. We discuss this more fully hereinafter.

5. Be all this as it may, defendant says that at any rate it has not as yet taken any rights from plaintiffs. It says they are still receiving all the water they ever got and that although it may some day take substantially all the water, it has not as yet done so.

It is true that plaintiffs are still getting all the water they ever got because defendant's project has not yet advanced to the stage where their water has been cut off. It is also true that on October 20, 1941, all the water in the river was being lawfully diverted by owners of prior appropriative and prescriptive rights at points above plaintiffs' lands. It is also true that during the period from October 20 to November 11, 1941, the flow would not, even in the absence of any artificial interference, have been high enough to have flooded plaintiffs' lands.

Plaintiffs, however, say that it is immaterial whether on October 20, 1941, the flow, if not interrupted by the defendant, would have been sufficient to reach and water the
220 lands of plaintiffs after satisfying prior appropriative and prescriptive rights. They say that defendant had announced its intention to take all the water of the river, had entered upon and proceeded forward with works designed to accomplish that end, had actually wholly interrupted the flow, except for an amount sufficient to satisfy the prior appropriative and prescriptive rights, and had permanently impounded 17,000 acre-feet of water in the 23-day period commencing October 20, 1941, and that this fixes October 20, 1941, as the date of taking.

As the dam was being constructed defendant left three openings in it at 316 feet above sea level which is approximately the normal level of the river, through which the water was permitted to flow. One after the other these

openings were closed, the last one on October 20, 1941. When this last one was closed, all the water, except for enough to supply prior appropriative and prescriptive rights, was shut off from lower riparian owners until the pool behind the dam reached elevation 375 feet. At this elevation there were provided permanent openings in the dam through which the water could be released to control the elevation of the pool. These openings were supposed to have in them what is known as needle valves, which when closed retain the water in the pool, but which when opened permit the water to escape. Above this level, at elevation 446, it was intended to divert the water in the pool into the Madera Canal, and finally at elevation 464 feet there was an opening through which it was intended to divert the water into the Friant-Kern Canal.

On November 11, 1941, the water reached elevation 375, which was the permanent opening in the dam for the release of the waters in the pool; but the defendant had been unable to secure the needle valves for insertion in this opening to prevent the escape of waters in the pool; hence, after the water in the pool reached this height, it flowed down the bed of the river uncontrolled. The defendant did not secure these valves until sometime in 1944, and in the meantime, except for the brief period while the water was rising from elevation 316 to elevation 375, plaintiffs continued to receive as much water as they had ever received. Based on these facts defendant says it did not take plaintiffs' water
221 rights on October 20, 1941, the date on which the temporary openings were closed. This is the issue presented.

The Supreme Court has not as yet definitely settled the question as to the time when a taking occurs through the erection of a dam. In the most recent case to come before that tribunal, *United States* v. *Dickinson*, 331 U. S. 745, the court held that a landowner might wait until his land had been actually flooded before bringing his action and that the statute of limitations did not begin to run against him until that time, but it said:

> We are not called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens.

Plaintiff in *Kincaid* v. *United States*, 37 F. (2) 602, alleged that the United States had taken his lands by the adoption of the Mississippi River Flood Control Act of May 15, 1928, and by the advertising for bids for the construction of certain guide levees bounding the Boeuf Floodway. The Mississippi River Flood Control Act of 1928 had

adopted what was known as the Jadwin Plan for the control of floods on the Mississippi River. This plan, among other things, called for the Boeuf Floodway, through which in times of extreme high water the river would be allowed to flow. It also provided for the erection of guide levees on each side of this floodway in order to retain the waters therein. The lands of the plaintiff in that suit lay within this floodway and he sued to enjoin the defendant from carrying out the plan without first condemning and paying him for his lands.

The District Court held (37 F. (2d) 602) that although the physical occupancy of the land within this floodway did not occur until the land had been overflowed in time of flood, still "the process or subjecting it to that service and the taking possession, insofar as is either necessary or contemplated by the act, will begin with the construction of the first levee or works which are intended to direct the water upon the land." Since it held that these acts were threatened and that it thought the plaintiff was without an adequate remedy at law, it enjoined the defendant from
222 proceeding with the construction of the floodway. The Circuit Court of Appeals affirmed (49 F. (2d) 768).

The Supreme Court granted certiorari. In its opinion in 285 U. S. 95, reported *sub-nom. Hurley* v. *Kincaid*, on pages 103 and 104, it said:

> • • • We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's lands constitutes a taking of it—as soon as the Government begins to carry out the project authorized. Compare *United States* v. *Lynah*, 188 U. S. 445, 469; *United States* v. *Cress*, 243 U. S. 316, 328; *Peabody v. United States*, 231 U. S. 530, 538; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; 260 U. S. 327, 329.

But it held that since, in its opinion, the plaintiff had an adequate remedy at law for the taking, if one had occurred, he was not entitled to the injunction he sought and, hence, it dismissed plaintiff's bill.

In *Sponenbarger* v. *United States*, 308 U. S. 256, plaintiff asserted that the lands within this floodway had been taken merely by the adoption by Congress of the plan contemplating the erection of this floodway. The Court, however, pointed out that the Act of Congress adopting this plan prohibited the doing of anything to carry it out other than the building of levees, until further surveys had been made

and until it had been determined whether or not the additional measures provided for, including the Boeuf Floodway, were advisable. It also pointed out that after these surveys had been made the Boeuf Floodway had in fact been abandoned. Under these facts the court held that there had been no taking of plaintiff's property, reversing the opinion of the Circuit Court of Appeals holding that there had been a taking.

In the cases of *Peabody* v. *United States*, 231 U. S. 530, and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; and 260 U. S. 327, there was not involved the question of when the taking had occurred, but whether or not there had been a taking at all; but, what was said in those cases sheds some light on the question of the time a taking actually occurs.

Plaintiffs, in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, alleged that the Govern-
223 ment had installed a battery and a fire control tower on lands to the rear of plaintiffs' lands, and that the guns from this battery could be fired only over plaintiffs' lands, and it was alleged that the defendant intended to do so at will. The court said:

> * * * If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose.

We think the reasoning behind this decision furnishes a guide for the determination of the time of the taking. That time, it would seem, comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent. So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.

In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands. This is evidenced by a number of things. The construction of the dam, which would result in the deprivation of plaintiffs' rights, had been begun on No-

vember 3, 1939, a considerable time prior to October 20, 1941. In the 23 days following that date a considerable body of water had been impounded in the pool behind the dam, and construction was continuing insofar as materials could be obtained.

Not only that, but defendant had paid for many of the rights they intended to take. They had entered into an agreement with Miller & Lux to pay them something like two and a half million dollars for the taking of water rights, some of which were appurtenant to lands riparian to this river, including plaintiffs' lands. There can be no doubt on the record that defendant's intention to take plain-
224 tiffs' rights had been clearly demonstrated and that it was in the process of carrying out that intention.

We have no doubt that a taking had occurred not later than October 20, 1941. Certainly by that time defendant had brought about a decrease in the value of plaintiffs' lands. With the imminent prospect of their being deprived of any further rights to the flood waters of this river, they could not have sold them for their former value.

We hold that the taking of plaintiffs' water rights occurred not later than October 20, 1941.

6. There remains only the question as to the valuation to be put on these water rights, or, otherwise stated, the difference in the value of the lands with and without the rights.

The Commissioner has found that plaintiff Potter is entitled to recover a sum which represents compensation at the rate of $9.00 per acre. This seems to us correct. The Bureau of Reclamation in the United States Department of Interior appointed a board of [illegible]veyors to appraise the lands with and without these w[illegible]rs rights. They found that the difference in value was $[illegible].00 per acre. The State of California also appointed a similar board. It found a difference of $8.75 an acre. Miller & Lux, Inc., which owned tens of thousands of acres of land riparian to this river, agreed with the defendant on $9.00 an acre. Plaintiff Potter himself testified the difference in value was between $10.00 and $15.00 an acre.

A decline in the market value of the Potter lands of $9.00 an acre is well supported by the evidence.

The Commissioner has found that the value of Martin Erreca's land was decreased by the sum of $2,500.00. Defendant does not except to the amount found, if plaintiff had any rights at all and if the defendant took them. We think this amount represents just compensation.

We have found the difference in value of the lands of the Gerlach Live Stock Company to be $10,440.00. This is at

$9.00 per acre, except for a part of the acreage of this company which the evidence shows was not benefited by the waters of the river. The defendant excepts to this on the same grounds as stated above. For the reasons
225 stated, we do not think the exception is well taken. We are of opinion that compensation of $10,440.00 is just.

Judgments will be rendered against the defendant in favor of plaintiffs as follows: in favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca in the sum of $2,500.00; and in favor of Gerlach Live Stock Company in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

The defendant on January 6, 1945, filed a motion to require the Southern California Edison Company, Ltd., and the San Joaquin Light and Power Corporation to appear and defend any interest they or either of them had in the litigation. Appearances by said companies were filed in due course. Since it appears that the interests of said companies are in no wise adverse to those of the plaintiffs or to those of the defendant, the action is dismissed as to them. It is so ordered.

HOWELL, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Justice,* concur.

227 *Judgment of the court—April 5, 1948*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows:

In favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca, in the sum of $2,500.00; and in favor of Gerlach Live Stock Company, in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff J. Sheldon Potter, in the sum of fifty-four thousand three hundred forty-three dollars and twenty-six cents ($54,343.26); in favor of Martin Erreca in the sum of two thousand five hundred dollars ($2,500.00); and in favor of

Gerlach Live Stock Company in the sum of ten thousand four hundred forty dollars ($10,440.00). On each of the judgment compensation for delay in payment will be computed at four (4) per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

229 *Proceeding after entry of judgment—June 1, 1948*

ORDER

It is ORDERED this 1st day of June, 1948 that the word "admittedly" appearing in the seventh line of the third paragraph on page 67 of the findings of fact and opinion be stricken; otherwise the findings of fact, conclusion of law and opinion will stand.

BY THE COURT
(s) MARVIN JONES
Chief Justice.

On June 4, 1948, the defendant filed a motion for a new trial.

231 On June 28, 1948, the court entered the following order on said motion:

ORDER

IT IS ORDERED this 28th day of June, 1948, that motions for new trial be and the same are overruled, as follows:

46009 Gerlach Live Stock Company,
46245 J. Sheldon Potter,
46244 Martin Erreca, • • • defendant's motions.

• • • • • •

BY THE COURT
(s) MARVIN JONES
Chief Justice.

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233 Clerk's Certificate to foregoing transcript omitted in printing.

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236 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46265

JAMES J. STEVINSON (a corporation), PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46265—Filed Dec. 11, 1944

Now comes the plaintiff above named, and complaining of the defendant above named alleges and shows to the Court:

I.

That at all the times in this petition mentioned plaintiff was and is a corporation duly incorporated under the laws of the State of California and authorized to do business in the State of California.

237 II.

That at all the times in this petition mentioned plaintiff was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced and the County of Stanislaus, State of California, described as follows:

Parcel 1:

A portion of the Orestimba Rancho more particularly described as follows, to-wit:

Commencing at the corner to Sections 3, 4, 9 and 10, in Township 7 South, Range 9 East, Mount Diablo Base and Meridian, and running thence South 36½° West, 11½ chains; thence North 21¾° West, 41 chains to Oak tree on bank of slough; thence South 60¼° West, 1.75 chains for place of beginning; thence with the true meridian, magnetic variation 15° 30' East, North 25½° West 113.43 chains; thence North 38¼° East 51.42 chains to the left bank of the San Joaquin River; thence up said San Joaquin River with its meanderings South 58° East, 2.30 chains South 42¾° East, 1.70 chains, South 18¾° East, 1.70 chains, South 18¾° East, 5 chains; South 49° East, 5 chain; South 65° East, 6 chains; North 86½° East, 5.52 chains; North 72° East, 5 chains; North 69½° East, 9 chains; North 84° East, 9.50 chains; South 35° East, 10 chains; South ¾° East, 4.43 chains; South 11¾° West, 4 chains; South 20½° West, 3.96 chains; South 35¼° West, 7 chains; North 89½°

West, 4.50 chains; South 67¾° West, 3.40 chains; South 39½° West, 7.26 chains; South 37½° East, 7.78 chains; South 47¾° East, 11 chains; South 17¾° East, 10.40 chains; South 52° West, 9.60 chains; South 79° West, 238 2.62 chains; South 86° West, 11.70 chains; South 77¾° West, 3.76 chains; South 56° West, 3 chains; South 41° West, 3.80 chains; South 12° East, 5 chains; South 37° East, 22.10 chains; South 5½° East, 6.25 chains; South 1½° West, 1.86 chains; South 13½° West, 2.50 chains; South 20° West, 4.25 chains; South 3½° West, 1.34 chains; South 9° West, 1.27 chains; South 20¼° East, 1.32 chains; South 21¾° East, 14.16 chains; thence leaving said South bank of San Joaquin River South 60¼° West, 19.75 chains, to place of beginning. Being portions of Sections 27, 28, 33 and 34 in Township 6 South, Range 9 East, and a part of Section 4 in Township 7 South, Range 9 East, containing 583.35 acres, more or less, being a part of the Orestimba Rancho.

Parcel 2:

In Township 6 South, Range 9 East, Mount Diablo Base and Meridian, Northeast quarter of Southwest quarter of Southeast quarter, West half and Southeast quarter of Southwest quarter of Southeast quarter and Fractional Lot 3 in Section 16; Fractional Lots 1, 2, 3 and 4 and Swamp and Overflowed Land Surveys Nos. 157 and 112, in Section 21; Fractional Lot 2 and Northwest quarter of Northwest quarter and portions of Swamp and Overflowed Land Surveys 155 and 160 in Section 27; Swamp and Overflowed Land Surveys Nos. 113, 160 and 155, Fractional Lot 1 in Section 28; portion of Swamp and Overflowed Land Survey No. 114 in Section 33, Fractional Lots Nos. 1 and 4, Swamp and Overflowed Land Surveys Nos. 156, 114 and 115 and East half, in Section 34; Fractional Lots 1, 2 and 3, Northwest quarter of Southwest quarter, and Southwest quarter of Northwest quarter, and Swamp and Overflowed Land Survey No. 67 in Section 35; Swamp and Overflowed Land Survey No. 67 in Section 36.

239 *Parcel 3:*

In Township 7 South, Range 9 East, Mount Diablo Base and Meridian, Fractional Lots 1, 2, 3, 4, 5, 6 and 7, Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 67, 69 and 76 in Section 2; Fractional Lots 1, 2, 3, 4, 5, 6 and 7, West half of Northeast quarter, Swamp and Overflowed Land Surveys Nos. 85 and 67, in Section 3; Swamp and Overflowed Land Surveys Nos. 67, 330 and 236 in Section 10; Fractional Lots 1, 2, 3, 4 and 5, Northeast quarter of Northwest quarter, Northeast quarter,

Swamp and Overflowed Land Surveys Nos. 330, 236, 232 (re-survey of 188), 235 (re-survey of 189), 380 and 281 and 282 in Section 11; Swamp and Overflowed Land Survey No. 232 in Section 12; Swamp and Overflowed Land Surveys Nos. 233 and 234, 385, 278, Fractional Lots 1, 2, 3 and 4 in Section 13; Swamp and Overflowed Land Surveys Nos. 233 and 234 in Section 14; Swamp and Overflowed Land Survey No. 130 North of County Road and Fractional Lot 1 in Section 24.

Parcel 4:

In Township 7 South, Range 10 East, Mount Diablo Base and Meridian, South half of Fractional Lot 1, Fractional Lot 2, and Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 19; all of Fractional Lot 2 in South half, Fractional Lots 3 and 4, Northeast quarter of Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 128, 231 (re-survey of 131), in Section 20; Fractional Lots 1, 2, 3 and 4, and Swamp and Overflowed Land Surveys Nos. 124 and 127 in Section 28; Fractional Lot 1 and Swamp and Overflowed Land Surveys Nos. 128 and 231 (re-survey of 131), in Section 29, Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 30.

240 III.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of live stock thereon, and for domestic purposes thereon.

V.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said River, situated to the north and south of Friant in the Counties of Madera,

Merced, Fresno, Tulare, Kings and Kern in the State of California, by the construction of a reservoir in the
241 main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the Counties of Madera and Merced, and the other leading south from said reservoir through the Counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said River which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said River and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day
242 the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VII.

That by said taking said land has been damaged in the sum of $75,000, and said sum, together with a sum equal to interest thereon from the date of taking to date of payment, at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VIII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable

to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

IX.

That there has been no assignment or transfer of the claim sued on herein, or any part thereof.

X.

That there has been no action on the said claim by Congress or by any department of the Government, except that Congress has appropriated money applicable to the payment of said claim and the Bureau of Reclamation promised to pay just compensation for the property taken, and has considered said claim but has been unable to agree with claimant on the amount of such compensation.

243

XI.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

XII.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this petition to be true.

XIII.

The following Acts of Congress and Acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on Rivers and Harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of Federal participation.

244

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000.00 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L. pp. 1028-1038); entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes"; and

authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which Act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,900,000.00 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S. A.L. pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year
245 ending June 30, 1938, and for other purposes", by which act $12,500,000.00 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S. A. L. pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000.00 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U. S. S. A. L. p. 291), which Act appropriated $9,000,000.00 to the Central Valley Project.

10. The Act of Congress of May 10 1939 (53 U.S.S.A.L. pp. 685-719), which Act, at page 719, appropriated $10,000,000.00 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000.00 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L. pp. 406-438), appropriating $23,000,000.00 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S.S. A.L. p. 1200), reauthorizing the Project.

14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L. p. 336), appropriating $34,700,000.00 for the Central Valley Project.

246 15. The Act of Congress of July 30, 1941 (55 U.S. S.A.L. p. 612), in aid of the construction of the Cen-

tral Valley Project and granting to the United States title of Indians in land embraced in the Project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000.00 for the Project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the Project.

WHEREFORE, plaintiff prays that plaintiff recover judgment against said defendant for the sum of $75,000, together with a sum equal to interest at 7% per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, Stevinson, California,
December 5, 1944.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

247 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

248 *General Traverse in Case No. 46266—Filed January 20, 1945.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

J. B. M.
E. E. E.

249 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46331.

ARCHIBALD J. STEVISON, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46331—Filed March 12, 1945.

Now comes the plaintiff above named and complaining of the defendant above named alleges and shows to the Court:

I.

That at all of the times in this petition mentioned plaintiff was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

Fractional Lots 1, 2, 3 and 4, and Swamp and Overflow Surveys Nos. 132 and 133, in Section 27,
250 Township 7 South, Range 10 East, M. D. B. & M., containing 432.67 acres.

II.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

III.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of livestock thereon, and for domestic purposes thereon.

IV.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land and non-riparian to said River,
251 situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California; by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading south from said reservoir through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the

water of said river which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

V.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevented the
252 same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VI.

That by said taking said land has been damaged in the sum of $9,000.00, and said sum, together with a sum equal to interest thereon from the date of taking to date of payment at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

VIII.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

253 IX.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any

way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this complaint to be true. The said plaintiff resides at Stevinson, Merced County, California.

WHEREFORE, plaintiff prays that plaintiff recover judgment against the defendant for the sum of $9,000.00, together with a sum equal to interest at 7% per annum from the 20th day of October, 1941 until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

254 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing. (All in italics.)*

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255 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46332

3-H SECURITIES COMPANY, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46332—Filed Mar. 12, 1945

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the Court:

I.

That at all of the times mentioned in this petition plaintiff 3-H Securities Company was a corporation organized and existing under the laws of the State of California and authorized to do business in the State of California.

II.

That at all of the times in this petition mentioned plaintiff was the owner in fee, in the possession and
256 entitled to the possession of all that certain parcel of land situate in the County of Merced, State of California, described as follows:

That portion of Swamp and Overflow Land Survey No. 130 in Section 24, Township 7 South, Range 9 East,

M. D. B. & M., situate south of County Road, containing 26 acres.

III.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of livestock thereon, and for domestic purposes thereon.

V.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation,
257 Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said River, situated to the north and south of Friant in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California, by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the Counties of Madera and Merced, and the other leading south from said reservoir through the Counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said River which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said
258 works and completed the same to such an extent that it was able to and did first take water of said River and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VII.

That by said taking said land has been damaged in the sum of $780.00, and said sum, together with a sum equal to interest thereon, from the date of taking to date of payment, at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VIII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

IX.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

259 X.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this petition to be true. That plaintiff's residence and principal place of business is in the County of Merced, State of California.

WHEREFORE, plaintiff prays that plaintiff recover judgment against the defendant for the sum of $780.00, together

with a sum equal to interest at 7% per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

260 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing. (All in italics.)*

261 *General Traverse in case No. 46331—Filed April 21, 1945*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) J. EDWARD WILLIAMS,
Acting Assistant Attorney General.

General Traverse in case No. 46332—Filed April 21, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) J. EDWARD WILLIAMS,
Acting Assistant Attorney General.

263 *Argument and submission of cases*

On January 7, 1948, the cases were argued and submitted on merits together by Mr. Edward F. Treadwell for plaintiffs, and by Mr. Ralph S. Boyd for defendant.

265 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.—Filed March 1, 1948.*

Mr. Edward F. Treadwell for the plaintiffs. *Messrs. Treadwell & Laughlin* were on the briefs.

Mr. Ralph S. Boyd, with whom was *Mr. Assistant Attorney General A. Devitt Vanech*, for the defendant.

These cases having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. At all times here involved, plaintiff James J. Stevinson was and now is a corporation organized and existing under the laws of and authorized to do business in the State

of California. For convenience, his corporation sometimes will be referred to in these ...dings as the "Stevinson Corporation."

266 2. At all times here involved, plaintiff 3-H Securities Company was and now is a corporation organized and existing under the laws of and authorized to do business in the State of California.

As respects the lands described in their petitions herein, plaintiffs 3-H Securities and Archibald J. Stevinson are the successors in interest of plaintiff Stevinson Corporation.

3. The Central Valley of California, approximately 450 miles in length, lies between the Sierra Nevada Mountains on the east and the fringe of indistinct mountain chains along the ocean on the west. The northerly two-fifths of the valley, known as the Sacramento Valley, is drained by the Sacramento River system, and the southerly three-fifths, known as the San Joaquin Valley, is drained by the San Joaquin River system. The Sacramento River flows south and the San Joaquin flows northwest. Both empty through the same large delta into Suisan Bay, an arm of San Francisco Bay. The controversies in these cases center around the right to the use of waters of the San Joaquin River.

THE SAN JOAQUIN RIVER AND ITS FLOOD PLAIN

4. The San Joaquin River is a natural watercourse, with well-defined channels and banks and with its source in the Sierra Nevada Mountains. It flows thence westerly to the plains of the San Joaquin Valley, which it enters at a point known as "Friant," the site of defendant's storage and diversion dam, whose effect upon the waters of the river is the basis of plaintiffs' claims in these actions. From this point, the river continues westward approximately 40 miles to a point in the valley near the town of Mendota, where it is joined by the Fresno Slough of Kings River. It then turns abruptly toward the north and flows in a northwesterly direction until it reaches San Francisco Bay. Certain tributaries empty into the San Joaquin between Friant and the lands of the respective plaintiffs and contribute water in varying amounts to the river's flow.

5. In its course through the mountains and foothills and for some distance after it reaches the valley floor, the banks of the San Joaquin are so high as to preclude
267 overflow, but after the river reaches a point known as Gravelly Ford, about 27 miles west of Friant, the banks become relatively low. In a state of nature and during periods of high or flood water, the river flowed out of its banks at places below this point and over and upon certain of the land on either side of the river, either di-

rectly or after flowing into sloughs or branch channels. Certain of the lands so overflowed were moistened, enriched, and fertilized by the overflow and, as a result, produced increased amounts of beneficial vegetation, except in the case of infrequent floods of unusual extent.

In the area of such overflow, the river flowed through numerous side channels, branch channels, reaches of backwater, and sloughs, in addition to the main channel, such extra channels being referred to generally as "sloughs." Some of the sloughs form networks; some have dead ends; some receive only backwater, and some receive water from the river and return it to the river at lower points, either directly or through connecting sloughs. Some sloughs branch off other sloughs. Some carry river water whenever there is water in the main channel; others carry river water only at higher river stages.

6. In the vicinity of the lands described in plaintiffs' petitions, the San Joaquin River, in a state of nature and at the lowest stages of flow, was confined by natural banks to a sandy channel between lands which were granted to the State of California as swamp and overflow lands under the Swamp Land Act of September 28, 1850, ch. 84, 9 Stat. 519. This channel, except during stages of higher flow, hereinafter described, contained the water flowing in the river and is referred to as the "low channel."

Within a few years after the passage of that act, the lines segregating such swamp and overflow lands from the adjoining higher lands were surveyed and platted by the United States. In substance, the surveyed line of segregation marked certain natural banks at various distances from the low channel banks of the river. At higher stages of the river in every year of ordinary flow, the waters spread over the swamp and overflow lands, and for a time were confined to a wider channel by such
268 natural banks, which were substantially the outer boundaries of the lands granted as swamp and overflow. This wider channel is referred to as the "high channel."

In every year of ordinary flow in a state of nature the river rose still higher, so that its waters were no longer confined to the high channel. The waters so overflowing the high channel banks and into and over the upland area moved slowly in the same general direction as the flow of the river in the low and high channels. This wide overflow was confined by rising ground on each side of the general overflow basin of the river. This is referred to as the "overflow channel."

The flood plain described in this and the preceding finding extends approximately from Gravelly Ford to a short

distance below the confluence of the San Joaquin with the Merced River.

The natural flow of the river has been and is variable in quantity, both over the years and in periods within the years. In the spring and summer the river is fed by the melting snow pack of the Sierra Nevada Mountains and in the winter season by rainfall, supplemented by a small amount of snow-melt in the lower reaches of the mountains. As a result there have been two periods of high water, the winter rain flood usually in December, January, and February, and the spring and summer snow-melt overflow usually in April, May, and June, with considerable variance in the times of commencement, duration, and the times of peak flow.

7. The lands described in the petitions of the respective plaintiffs border on the main channel.

PRIOR RIGHTS

8. On November 14, 1927, the Stevinson Corporation, as the second party and the East Side Canal & Irrigation Company, as the first party, entered into an agreement with Southern California Edison Company, Ltd., as the third party, which reads in part:

> • • • the said party of the first part and the said party of the second part hereby convey to said
269 party of the third part, its successors and assigns, forever, the right to take, divert, store and use the waters of the said San Joaquin River and its tributaries and branches entering said river above Herndon, Fresno County, California, at such points and places thereon above Herndon as may be desired by the party of the third part, and in such amounts and in such manner as may be desired by said party of the third part, and for use in such reservoirs, tunnels, conduits, power houses and other works as said party of the third part may desire to use same for the purpose of producing hydro-electric power, and incidentally for domestic purposes necessary in connection with the construction and operation of such works; and said party of the first part and said party of the second part hereby convey to the party of the third part, its successors and assigns forever, an easement in the canals and works of the party of the first part and in the lands now owned by the party of the second part described herein, entitling said party of the third part to so take, divert, use and store said water as against the canal of the party of the first part and the land of the party of the second part and as against the party of the first part and the party of the second part as the owners thereof, or otherwise; the

land so claimed by party of the second part being more particularly described in Schedule "A" attached hereto; but the easement hereby conveyed shall be in and to the said land and any other land now owned by the party of the second part, and in any right which the party of the first part or the party of the second part may now have in or to the waters of said river; the right and easement hereby granted to the party of the third part being subject to the sole condition that the waters so taken, diverted, stored and used by the party of the third part for the production of hydro-electric power shall be, after such use, returned to the San Joaquin River at some points or placed thereon above Herndon, in Fresno County, California, without further claim thereto by the party of the third part as against the parties of the first and second parts.

* * * * * * *

Nothing herein contained shall be construed as an extinguishment, abandonment or waiver of the riparian rights of the party of the second part or as a conveyance of its riparian rights, or as otherwise affecting the said rights in any respect whatsoever, except as to and in favor of the party of the third
270 part, its successors and assigns, for use as herein provided, and nothing herein contained shall be construed as interfering with or affecting the right of the party of the first part or the party of the second part to take and enjoy or use any of the water of the said river and its branches and tributaries not so taken, diverted or used by the party of the third part in pursuance of the license, privilege and easement hereby granted to the party of the third part, and nothing herein contained shall be construed to affect any right which the party of the first part or the party of the second part may have to take, divert and use any water of said river, its branches and tributaries, subject to the rights hereby granted to the party of the third part, and said party of the second part hereby expressly preserves and retains its riparian rights, and party of the first part hereby expressly preserves and retains its water rights in all respects as against all parties other than the party of the third part, its successors or assigns.

The lands involved in these cases are among those described in Schedule A attached to the agreement.

9. During the period from 1895 to 1928, Southern California Edison Company Ltd. and San Joaquin Light and Power Corporation, or their predecessors, constructed

dams and reservoirs in the San Joaquin River basin above Friant and stored water in the reservoirs and released and regulated the flow of the waters through a series of power plants. Beginning in 1906, Miller & Lux Incorporated, a corporation, and its subsidiaries entered into numerous contracts with the two power companies, or their predecessors, by the terms of which it was agreed generally that, subject to certain limitations as to times and quantities, the two companies might store waters of the San Joaquin River System during comparatively high stages of the flow, and use the stored water for the production of power and return it to the river above the lands owned by Miller & Lux Incorporated during lower stages of the flow.

The effect of such operations has been to reduce the amount of the flow in periods of high water and to increase the amount of the flow during periods of low water. As new reservoirs were put into operation during these years, the regimen of the river below Friant was materially and progressively altered.

10. At the respective times here involved, San
271 Joaquin & Kings River Canal & Irrigation Company, Gravelly Ford Canal Company, Columbia Canal Company, Firebaugh Canal Company (formerly Panoche Canal Company), and San Luis Canal Company were corporations subsidiary to Miller & Lux Incorporated, which owned all or a majority of the stocks of each of such subsidiaries and had the controlling interest in each of them.

Prior to any of the times here involved, such subsidiary corporations, with the consent of and under agreements with Miller & Lux Incorporated, constructed certain canals and works and thereby diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands riparian to the San Joaquin River owned by Miller & Lux Incorporated, and also for the irrigation of lands non-riparian to the San Joaquin River owned by Miller & Lux Incorporated and by other persons.

Also prior to any of the times here involved and in addition to the foregoing diversions, Miller & Lux Incorporated constructed certain canals and works and thereby diverted and appropriated waters of the San Joaquin River for the irrigation of lands owned by it, both riparian and non-riparian to the San Joaquin River.

11. Prior to January 21, 1929, there were pending certain lawsuits between Miller & Lux Incorporated and its subsidiaries, on the one hand, and the Stevinson Corporation, on the other. On that day in order to settle those lawsuits, to confirm in Miller & Lux Incorporated and its

subsidiaries certain appropriative or prescriptive rights asserted by them, and to confirm in Miller & Lux Incorporated the right to use certain water released from storage by San Joaquin Light and Power Corporation and Southern California Edison Company, Ltd., Miller & Lux Incorporated and its subsidiaries and the Stevinson Corporation entered into a written agreement which reads in part:

"1. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto Second Party [San Joaquin & Kings River Canal & Irrigation Company] its successors and assigns forever, an easement in the said lands now owned by First Party described herein, entitling Second Party to take, use and divert above the intake of the East Side Canal & Irrigation Company in Township Nine (9)
272 South, Range Twelve (12), East, M. D. B. & M., a continuous flow of thirteen hundred and sixty (1360) cubic feet of water per second of the San Joaquin River, to either riparian or non-riparian lands and wherever situated, as against the land of First Party and as against First Party as the owner thereof, or otherwise, the land so owned by First Party being more particularly described in Schedule "A" attached hereto and made a part hereof by reference. The requirement that said water shall be taken, used and diverted above the intake of the East Side Canal shall not be deemed a limitation on the place of use of the water when taken from the river, but means only the point above which the water must be diverted from said river.

"2. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto the Firebaugh Canal Company, a corporation, and to Miller & Lux Incorporated, a corporation, their successors and assigns forever, an easement in all of the lands owned by First Party and described in said Schedule "A", entitling said Firebaugh Canal Company and said Miller & Lux Incorporated, their successors and assigns forever, to take and divert above the said intake of the East Side Canal & Irrigation Company and use sufficient water of said river, if the same be there flowing, as against said land and First Party as the owner thereof, or otherwise, for the irrigation of forty-five thousand (45,000) acres of the land described in Schedule "B" annexed hereto and made a part hereof by reference, with the right to substitute other land in lieu thereof in the same general area.

3. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto the San Luis Canal Company, Columbia Canal Company, Gravelly Ford Canal Company, and Miller & Lux Incorporated, their and each of their successors and assigns forever, an easement in the land owned by the First Party and described in said Schedule "A", entitling said San Luis Canal Company, said Columbia Canal Company, said Gravelly Ford Canal Company and said Miller & Lux Incorporated, and each of them, to take, divert and use the water of said river as against the land of First Party, and as against First Party as the owner thereof, or otherwise, to the extent that the water has been historically diverted by said Companies, with the right to change the place of use of said water, whether within or without the water-
273 shed, as desired by said canal companies and by Miller & Lux Incorporated, or either of them, their and or each of their successors and assigns.

4. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto Miller & Lux Incorporated, a corporation, its successors and assigns forever, an easement in its land entitling said Miller & Lux Incorporated to take, divert and use all the water of said river stored by said San Joaquin Light & Power Corporation and said Southern California Edison Company, and thereafter released from such storage, as against the land of First Party described in said Schedule "A", and First Party as the owner thereof, or otherwise; and First Party hereby confirms the claim of Miller & Lux Incorporated to the full and complete title to said released water, and waives any claim thereto;

. . . . . .

5. In all cases where an easement is conveyed in the lands of First Party, [Stevinson] said easement shall be in and to the said land described in said Schedule "A" and any other land now owned by First Party, and in any right which First Party may now have in or to the waters of said river; and nothing herein contained shall be construed as an extinguishment, abandonment or waiver of the riparian rights of First Party, or as a conveyance of its riparian rights, or as otherwise affecting the said rights in any respect whatsoever, except as to and in favor of the parties herein mentioned, their successors and assigns; and nothing herein contained shall be construed as interfering with or affecting the right of First Party to take and enjoy or use any of the

water of the said river and its branches and tributaries, not so taken, diverted or used by the parties hereto to whom easements are hereby granted by First Party; and First Party hereby expressly preserves and retains its riparian rights in all respects as against all parties other than the parties hereto expressly granted easements hereby.

12. Certain other appropriative or prescriptive rights to water of the San Joaquin River were acquired by persons other than plaintiffs, and plaintiffs concede that, in addition to the rights of the two power companies and of Miller & Lux Incorporated and its subsidiaries in relation to stored water, the following appropriative or prescriptive rights to the use of the water of the San Joaquin River are superior and prior to the riparian rights of plaintiffs herein:

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Name	Maximum cubic feet per second	Yearly maximum acre-feet
Miller & Lux Incorporated and certain of its subsidiaries:		
Aliso Canal (diverted from head of Aliso Slough)	302	59,784
Chowchilla Canal (diverted from Lone Willow Slough)	120	49,300
Columbia Canal (diverted through Lone Willow and Brown Sloughs)	150	45,374
Lone Willow Slough, Aliso Slough, Brown Slough (diverted through various weirs, dams, levees and other works)	313	61,907
Temple Slough	463	157,296
San Joaquin Canal (diverted by Miller & Lux through canals of San Joaquin & Kings River Canal & Irrigation Company)	285	128,294
Mowry Slough (Little San Joaquin)	26	5,218
Borland Ranch	14	7,580
Pick Anderson Slough (diverted by canals taking out of Pick Anderson Slough and by dams and levees in and along said slough and its branches)	98	17,000
Orestimba Grant (diverted through Poso, Temple, Santa Rita, Pick Anderson and other sloughs by weirs, dams and levees in and along said sloughs)	264	52,264
San Joaquin & Kings River Canal & Irrigation Company, Incorporated right (Main, outside & Helm Canals and Helm Ditch)	1,360	512,730
San Luis Canal Company right (Helm Canal)	540	170,388
Gravelly Ford Canal Company	600	39,314
Firebaugh Canal Company	300	68,025
James and Tranquility Irrigation Districts		29,300
Blythe Canal		11,600
Edison Securities Companies		6,100
Other lands irrigated from waters taken from the San Joaquin River between Friant Dam and the head works of the Gravelly Ford Canal		30,464
		1,458,538

[1] Estimated.

The appropriative and prescriptive rights confirmed in Miller & Lux Incorporated and its subsidiaries by the agreement quoted in finding 11 are included in the above tabulation.

A cubic foot per second, also called a second-foot, is the rate of discharge flowing in a channel of a rectangular cross-section one foot wide and one foot deep at an average velocity of one foot per second. Water flowing at the rate of one cubic foot per second for 24 hours will produce a volume of water equal to approximately 2 feet in depth covering one acre or two acre-feet.

THE WATER SUPPLY AND THE SURPLUS AVAILABLE TO PLAINTIFFS

13. Among other factors, the extent and the value of the riparian rights of the lands described in the petitions of plaintiffs herein depend upon the quantity of water which reasonably may be expected to become available for use on such lands in times subsequent to the time of such valuation.

Because of the substantial variation from year to year and from month to month in the quantity of water dis-
275 charged by the river, the amount of water which may be discharged in any future month, year, decade, or score of years cannot be predicted with any assurance of approximate accuracy. It is, however, customary to use the record of past discharges for the purpose of making estimates of the future discharge of streams.

14. In 57 of the 68 water years between 1879 to 1946, both inclusive, in which the discharge of water is computed from measurements, the average yearly discharge was 1,811,082 acre-feet.

15. In any year here involved, owners of appropriative or prescriptive rights below Friant Dam and upstream from plaintiffs were and are entitled to the use of a maximum of 1,458,538 acre-feet of water (finding 12). Deducting the amount of the prior appropriative or prescriptive rights from the average yearly discharge of 1,811,082 would give an average yearly surplus of 352,544 available for use on lands having riparian rights. The records of water actually diverted show that the prior appropriators, in the aggregate, do not divert and put to use as much water as authorized by the rights listed in finding 12. In the period 1932-1944, inclusive, the highest aggregate diversion was 1,020,516 acre-feet, and the yearly average diversion 870,940 acre-feet.

Actually, there were few years when the discharge was approximately that of the yearly average. In many years the excess over the yearly average ran high and in many years the deficiency dropped low. In some of the low years,

the discharge was less than the aggregate of maximum diversion to which prior appropriators were entitled.

16. Yearly discharges varied in volume from a high of 5,211,000 acre-feet in 1886 to a low of 507,000 acre-feet for the year 1924. By ten-year periods, the average yearly discharge was as follows:

Years:	*Yearly average in acre-feet*
1937-1946, inclusive	2,030,300
1927-1936, inclusive	1,286,200
1917-1926, inclusive	1,463,700
1907-1916, inclusive	2,210,044
1897-1906, inclusive	1,799,157
1887-1896, inclusive (estimated)	1,952,870
1879-1886, inclusive (8 years)	2,476,125

276 During each of such ten-year periods, the discharges for separate years varied widely.

17. As the flows actually occurred, there were times of the year when, as a matter of right, the owners of appropriative and prescriptive rights, without reaching or exceeding their maximum limits in cubic feet per second, diverted substantially all the water of the stream, leaving no surplus for downstream riparian owners. At other times, the discharge exceeded the capacity of the diversion works of such appropriators and their requirements for use, as well as exceeding the maximum limit in cubic feet per second under their rights. At such times a surplus flowed down the river to become available for use by riparian owners.

The discharge is not uniform throughout a year, nor do the relative discharges for the months within the year remain constant. The highest monthly discharge during the year usually occurs in May or June, although occasionally it occurs in April or August. The yearly cycle, with its variability, is illustrated by the following table showing the percentage of the yearly total discharged each month:

Month	Monthly percentage for the year 1945	Average monthly percentage for the period 1905-45, inclusive
January	3.116	4.123
February	8.581	5.326
March	7.642	7.543
April	12.242	11.074
May	15.045	16.356
June	12.561	15.703
July	11.149	25.356
August	8.451	4.414
September	6.085	2.757
October	5.370	2.389
November	4.621	2.116
December	5.137	2.843

18. During the irrigating season each year, when the discharge has dropped below the amount required to satisfy the appropriative or prescriptive rights upstream from plaintiffs, and such prior rights take all the water of the river, the final downstream diversion is made at the head of Temple Slough, where a temporary dam, referred to as "Sack Dam," is placed across the river. A chart showing the dates when the dam was put into operation each
277 year for the period 1926-1945 is in evidence. The times the dam was put into operation corresponded with the times following the peak of the spring flood, when the discharge decreased to a point where it became necessary to take the whole flow for the use of the prior appropriative and prescriptive rights.

The period shown by such chart included some years of exceptionally high and some years of exceptionally low discharges, as well as several years in which the discharge approximated the long-time yearly average. In the absence of a complete record of the dates on which Sack Dam was annually installed, the chart for this period is accepted as indicating the times the dam was installed in other years under approximately similar discharge conditions.

19. Not taking into consideration temporary installations or unsubstantial interruptions in maintenance, Sack Dam was installed at the following times in the twenty-year period 1926-1945, inclusive, and all water of the San Joaquin River flowing at the site thereof was diverted from the river for the remainder of the irrigating season (except for an immaterial amount of seepage and a small quantity permitted to pass through a fish weir in the years 1944 and 1945):

Period during which dam installed:	*Number of years out of 20 the dam was installed in the period specified*
Between February 1-15, inclusive	1
Between March 1-15, inclusive	3
Between March 16-31, inclusive	1
Between May 16-31, inclusive	1
Between June 16-30, inclusive	2
Between July 1-15, inclusive	6
Between July 16-31, inclusive	2
Between August 1-15, inclusive	3
Between August 16-31, inclusive	1

Comparison of these dates with the records of annual discharges show that, in general, the higher the average annual discharges of the river, the later in the year was Sack Dam installed.

20. The records of diversions also show that there is a period in every year, usually commencing in October, November, or December, when Sack Dam is discontinued for the water year. Such period of open flow ends the next summer when there is no longer an excess of water
278 over the requirements of the prior appropriative and prescriptive rights, and Sack Dam is reinstalled. Generally, this open period commences just prior to the winter rains, when the discharge of the river is relatively low, but the demand for water is even lower. The excess of supply over demand continues through the rising volume of discharge caused by the winter and spring floods. It continues through the peak of the spring floods and is cut off by the installation of Sack Dam as the high discharges from the spring floods begin to subside. It is only during this period that water is available for use under downstream riparian rights.

However, the downstream riparian lands are not irrigated by such water throughout the whole period of such surplus, but only during a relatively short period at the peak of the spring floods, except in years of exceptionally low water, when the spring floods flow over and upon the grasslands described in the petitions of plaintiffs and moisten and enrich them, as hereinafter stated, and benefit and increase the growth of grass and other forage.

During the whole period in which a surplus passes the site of Sack Dam, water of the river becomes available to riparian owners for domestic use and for the purpose of watering livestock, but it is not satisfactorily established that such uses contribute substantially to the value of the riparian rights. The only substantial benefit is that derived from the moistening and enrichment of the soil by flooding during the relatively short period in which the spring flood reaches such proportions that the lands described in plaintiffs' petitions are overflowed.

Such flood water, which moistens and enriches the grasslands referred to, is a part of the natural flow of the river and is not water stored by the San Joaquin Light & Power Company or Southern California Edison Company, Ltd., and thereafter released from storage.

As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation. Its flow into the Bay has some effect in repelling the encroachment of salt water into cultivated and cultivable lands on the delta and thus maintaining the usefulness for agricultural purposes. There is no evidence making an exact

279 or approximate evaluation of the use of such surplus water for this purpose.

21. Grasslands in the vicinity and of the kind here involved can utilize approximately 3 acre-feet per acre per year with maximum benefit. The use of less water per acre is beneficial but to a less degree. The use of more water per acre is detrimental.

The quantity of water per acre applied to the irrigation of controlled crop and grasslands is capable of determination with relative accuracy, since the flow can be controlled, measurements can be taken in regulated diversion and distribution works and the amount of waste computed. However, the quantity of flood water beneficially utilized on uncontrolled grasslands cannot be so measured. After a few hours of flooding, the soil becomes saturated and can absorb no more water. Any additional water flows away, returns eventually to the river, and is lost so far as the flooded land is concerned. The amount of water absorbed depends upon factors which may differ at relatively short distances, among which factors are the depth and the character of material which constitutes the soil. The amount of such absorption, however, is probably under one acre-foot per acre from one flooding. Notwithstanding lack of means to measure the absorption, the flood waters in fact promote the growth of grass and other forage, and the market value of the land with and without the benefit of such growth can be determined.

22. The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners. There are in the flood plain of the river, described in findings 5 and 6, a large number of riparian uncontrolled grasslands, including that described in the petitions of plaintiffs, which lands are entitled to share in the petitions of plaintiffs, which lands are entitled to share in the surplus water after prior appropriative and prescriptive rights have been satisfied. Downstream from the flood plain here involved are other riparian lands and also some streams flowing into the San Joaquin River from the east side. The quantity, extent, claims, and adaptability of such lands to irrigation are not disclosed by the evidence.

280 The utilization of the surplus flood waters by such downstream lands is not shown, but the larger part of the flood waters, supplemented by accretions from east side streams, passes these lands without being diverted or utilized. The only plan for utilization of such flood waters disclosed by the record is that of defendant, hereinafter de-

scribed, the diversions under which plan will not serve such riparian owners downstream. There is no evidence of past use by, or of any plan for the future benefit of, the downstream riparian owners, which is impeded or diminished by the customary flooding of plaintiffs' lands as herein stated.

DEFENDANT'S PLAN FOR UTILIZATION OF THE WATER

23. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California.

Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in the San Joaquin River at Friant. The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant.

24. The plan was duly approved by the President of the United States on December 2, 1935, such plan being set forth in a letter dated November 26, 1935, from the Secretary of the Interior to the President, which reads in part:

• • • • •

281 *General Description of Project*

The Central Valley project embodies a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers to provide urgently needed water supplies for existing agricultural, industrial, and municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of

commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt-hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal, and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition, water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles, lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature, has filed notices of appropriation on the principal streams, which are in good standing.

Water supplies studies made by the Department of Public Works of California, U. S. War Department, and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features

The principal engineering features of the project are as follows:

Kennett Dam Unit.—The Kennett Reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200-mile power transmission line will extend to a main distributing substation near Antioch on Suisan Bay.

Contra Costa Conduit.—A canal, capacity 120 second-feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial, and agricultural water requirements.

San Joaquin Pumping System.—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett Reservoir through a channel into San Joaquin delta for salinity control, irrigation, and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota weir on San Joaquin River, elevation 160 feet. These works
283 will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir.—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights on the San Joaquin River.

Friant-Kern Canal.—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal.—The Madera Canal, maximum capacity 1,500 second-feet, will extend from Friant Reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett Dam, Reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant Dam and Reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights, and general expense	8,000,000
Total	[1]170,000,000

[1] So in the original.

Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

25. The plan has been altered in a number of respects since it was approved by the President. Among other things, the height of the Friant Dam has been increased from 250 feet to 320 feet, enlarging the storage capacity from 400,000 acre-feet to 520,000 acre-feet. The pro-
284 posed pumping system, which would have conveyed Sacramento River water up the bed of the San Joaquin River by means of natural and artificial channels and works in a series ending at the mouth of the Merced River, has been supplanted by another which will pump Sacramento River water from the Delta into the proposed Delta-Mendota Canal, to be carried thence by gravity south to Mendota. The planned capacity of the Friant-Kern Canal has been increased from 3,500 to 4,000 cubic feet per second. Due primarily to the exigencies of the second World War, substantial portions of the project are not yet completed. Friant Dam still is without the drum gates for the spillways at the top and, until such gates are installed, the dam will impound approximately 100,000 acre-feet of water less than the planned storage. Friant-Kern Canal is under construction, but has not been completed.

26. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-

riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian uncontrolled grasslands.

The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant. Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on croplands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water
285 would be released from the Friant Reservoir to meet the requirements of the cropland rights.

The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished.

27. With some modification, defendant's original plan has continued as the plan of defendant, and it has proceeded to carry it out by engaging in the construction of the dam at Friant and the Madera and the Friant-Kern canals, as well as certain other branches of the project.

To finance such work Congress has appropriated large sums of money by the following described acts:

June 22, 1936, c. 689, 49 Stat. 1597, 1622	$ 6,900,000
August 9, 1937, c. 570, 50 Stat. 564, 597	12,500,000
August 26, 1937, c. 832, 50 Stat. 844, 850	12,000,000
May 9, 1938, c. 187, 52 Stat. 291, 324	9,000,000
May 10, 1939, c. 119, 53 Stat. 685, 719	10,000,000
April 6, 1940, c. 77, 54 Stat. 82, 87	5,000,000
June 18, 1940, c. 395, 54 Stat. 406, 438	23,600,000
June 28, 1941, c. 259, 55 Stat. 303, 336	34,750,000

The act of October 17, 1940 (c. 895, 54 Stat. 1198, 1200), reauthorized the project, and the act of July 30, 1941 (c. 334, 55 Stat. 612), in aid of the construction of the project, provided for acquisition of Indian lands embraced therein.

(a) *Purchase of the prior rights of Miller & Lux Incorporated and agreement for exchange of water.*

28. Promptly after the approval of the plan, defendant proceeded to ascertain the extent of the controlled grassland and the riparian water rights and the compensation to be paid therefor. On July 27, 1939, the defendant and Miller & Lux Incorporated and its subsidiaries entered into a written contract whereby Miller & Lux Incorporated and its subsidiaries agreed to relinquish or convey to defendant all their rights to the use of water of the San Joaquin River, except and in excess of specified rates of flow deemed to be equivalent in quantity to their existing water supply under rights for the irrigation of croplands.

286 29. The rates of flow specified in such contract as being reserved by Miller & Lux Incorporated were mean daily flows in cubic feet per second as follows:

During the month of—	*Number of cubic feet per second, plus the Chowchilla Canal right*
January	400
February	535
March	1,310
April	1,950
May	2,285
June	2,450
July	2,475
August	2,210
September	1,335
Octo er	660
November	485
December	400

The Chowchilla Canal right varies according to the flow, the maximum per year being estimated at 49,300 acre-feet (finding 12).

Computing on the basis of 2 acre-feet per day for one second-foot of flow and estimating the Chowchilla Canal right at 49,300 acre-feet, the yearly aggregate reserved by Miller & Lux Incorporated, and its subsidiaries, is 1,056,340 acre-feet.

30. On the same day that Miller & Lux Incorporated and its subsidiaries and the defendant made the agreement for the sale and purchase of the controlled grassland and riparian rights, they entered into a further agreement, referred to as the "contract for exchange of waters." This agreement provided in detail for the release of water from Friant Reservoir and for the delivery of substitute water through the Delta-Mendota Canal when that system would become operative.

On September 14, 1939, Miller & Lux Incorporated and Gravelly Ford Canal Company made, executed, and delivered to defendant a conveyance of the rights described in the agreement dated July 27, 1939.

(b) *Construction of works and impounding of water*

31. Friant Dam is a straight gravity concrete dam. Its total length at the top is 3,430 feet and the maximum
287 height is 320 feet. Across the top of the dam is a roadway whose elevation above mean sea level is 583 feet. Unless otherwise mentioned, all the elevations given in connection with the openings hereinafter mentioned are the elevations at the upstream face of the dam and relate to mean sea level.

The only openings extending entirely through the dam are those hereinafter mentioned. The first is the spillway at the top of the dam which is designed to be controlled by three drum gates. These drum gates when installed will be large steel cylinders, each 100 feet long and 18 feet in diameter, which will float up and down in a chamber at the bottom of the spillway opening and will be raised and lowered by the water let into and released from the chamber. By increasing the amount of water in a chamber the gate will float up, closing, to the extent desired, the opening which the particular gate is to control. By reversing the process the gate will go down. It can be adjusted and held to any point. When the gates are raised to the designed maximum elevation, the maximum water surface will be at elevation 578. When the gates are completely lowered, the maximum water surface will be at elevation 560, except for the head required to flow the water over the spillway. The drum gates were intended to be installed in 1942, but due to the advent of war in 1941, progress in that connection was halted and the drum gates are not yet installed.

The next lower opening is the outlet to the Friant-Kern Canal at the south side of the dam. The center line of the outlet is at elevation 464.

The next lower opening is the outlet to the Madera Canal at the north side of the dam. The center line of the outlet is at elevation 446.

Next are four openings referred to as the permanent river outlets, all on the same level. The inverts, the lowest points in the cross sections of the openings, are at elevation 375.42.

The next were three temporary openings, used during construction to permit the water of the river to pass, but which were later filled with concrete. The floors of these openings were at elevation 316.

The normal low-water surface of the river prior to the construction of the dam was at elevation 305.6.

The following table sets out the elevations above sea
288 level and corresponding elevations above the normal low-water surface of the river at the site of the dam.

	Elevation in feet above mean sea level	Height in feet above normal low-water surface of river
Roadway on top of dam	583	277.4
Water surface with drum gates raised	578	272.4
Water surface without drum gates	560	254.4
Center line of outlet to the Friant-Kern Canal	464	158.4
Center line of outlet to the Madera Canal	446	140.4
Invert of river outlets	375.42	69.82
Floor of temporary construction openings	316	10.4
Normal low-water surface of river	305.6	0

32. The contract for the construction of the dam was awarded on October 9, 1939, and construction was commenced on November 3, 1939. In the early stages of construction, and prior to March 6, 1941, the water of the river was carried over the foundation of the dam in a wooden flume. The floor of the flume was 4.4 feet above the normal low water surface of the river. The amount of water impounded by reason of this difference in elevation is not disclosed. At one time while the flume was being used to pass the water, some high water exceeded the capacity of the flume, backed up behind the dam, and flooded the works. This flooding was not an intended consequence of the work, although a calculated risk.

33. The concrete work of the dam was divided into sections, referred to as blocks, numbered consecutively from one end of the dam to the other. As the concrete work progressed, three temporary openings, each 14 feet square, were left in the base of the dam through blocks 37, 39, and 41. The elevation of the floors of these openings at the upstream face was 10.4 feet above the normal low water surface of the river. When use of the wooden flume was discontinued and the river was diverted through these temporary openings, there was a permanent impounding of water immediately behind the dam to a depth of not less than 10.4 feet. The number of acre-feet impounded is not shown, but was negligible.

During the late summer or early fall of 1941, the water was cut off from the temporary opening in block 41 and was carried through the temporary openings in blocks 37 and 39. Steel gates, in the nature of a headworks struc-

289 ture, then were firmly installed at the upstream end of the temporary outlet through block 41. Next, steel gates were similarly installed in the temporary outlet through block 39. After the gates were installed and in good operating condition, all the water was passed through the gate-controlled openings through blocks 39 and 41, and the outlet through block 37 was completely filled with concrete and permanently sealed off against further passage of water.

As the natural flow decreased with the season, the outlet through block 39 was cut off, all the water was passed through the gate-controlled temporary opening through block 41, and the opening through block 39 was filled with concrete and permanently sealed. That left only the temporary opening through block 41 open and in operation.

34. Prior to October 20, 1941, the concrete work in the dam had been completed to above elevation 400, but not as high as the elevation of the designed outlet into the Madera Canal. On or about that day, the gates in the temporary outlet through block 41 were partially closed for the purpose of impounding water and at the same time allowing the passage of approximately the amount of water required to be released under the agreement of July 27, 1939, with Miller & Lux Incorporated and its subsidiaries. This operation raised the surface of the water in the reservoir until, on November 11, 1941, the water reached elevation 375.42 and commenced to spill through the permanent river outlets.

The water was then cut off from the temporary outlet through block 41 and the work of permanently sealing that outlet was begun. The sealing was completed in about five months. Except for the amount approximately equalling the quantities reserved by Miller & Lux Incorporated and its subsidiaries, no water passed the dam between October 20 and November 11, 1941.

When the water was cut off from the last temporary opening and the opening was sealed, the water below the inverts of the permanent river openings was permanently impounded, with no means left for its release. The amount so impounded was approximately 17,400 acre-feet.

35. The permanent river outlets were designed to be controlled by needle valves. Defendant had been taking steps preliminary to the purchase of the valves when the
290 international situation became so bad, and demands for materials for defense purposes became so great in the fall of 1941, that the valves could not be obtained. Except for the emergency and for the ensuing war, the valves to control the permanent river outlets would have been installed in the year 1942.

In the fall of 1941 the Madera Canal had been constructed to the extent of about 7 miles, but had not yet been completed. Construction of the Friant-Kern Canal had not been commenced.

For a short time in the winter of 1942, a high flow in the river caused more water to enter the reservoir than could be drained by the uncontrolled permanent river outlets and water was temporarily impounded to elevation 415. As the flow of the river dropped, the water impounded above the elevation of the permanent outlets drained through the uncontrolled permanent outlets into the river below the dam. At a time not disclosed by the evidence, temporary plugs were put into two of the permanent river outlets.

In 1943 valves for two of the permanent river outlets and for the Madera Canal outlet were borrowed from Boulder Dam and were installed. The first storage of water in the reservoir by means of closing or partially closing one of these valves was started on February 21, 1944.

36. The Madera Canal was completed in 1944. The surface level of the water in the reservoir was then raised sufficiently to divert a large quantity thereof through the Madera Canal, from which it was used to raise the general water table in the area served by the canal. Approximately 302,600 acre-feet of water was stored behind the dam at this stage of the operation. The flow of water through the dam was never completely stopped. For the six months after the needle valves were installed, the quantity of water released monthly was approximately that required under the agreement of July 27, 1939, between the defendant and Miller & Lux Incorporated and its subsidiaries. During and after September 1944 the releases were substantially larger than the requirements of such contract, except during the months of November and December 1944, when they were substantially equal to such requirements.

In 1945 by means of control at the permanent river outlets,
the reservoir was filled to the base of the openings for
291 the drum gates, creating a storage of approximately
430,000 acre-feet of water. The drum gates are not yet installed and for that reason the reservoir has not yet filled to its designed capacity.

OTHER SOURCES OF SUPPLY

37. Defendant contends that there are and will continue to be certain sources of water available to plaintiffs notwithstanding the construction of Friant Dam and the planned diversion of water through the Madera and Friant-Kern Canals.

When the Friant-Kern Canal is completed and the planned operation of the dam and the Madera and Friant-Kern Canals become fully effective, the amount of water from the east side streams combined with all other upstream inflows would not be sufficient to produce the amount of water required to overflow the lands of the plaintiffs hereinafter described.

THE CALIFORNIA CONSTITUTION

38. An amendment to the constitution of the State of California, Article XIV, Section 3, approved by the voters on November 6, 1928, reads:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *Provided, however,* That nothing herein contained shall be construed as de-
292 priving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot

per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood water heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

NAVIGABILITY

39. The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 23-27, inclusive, no evidence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that
293 when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channels as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.

There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

CLAIM OF JAMES J. STEVINSON—NO. 46265

40. At all times here involved plaintiff James J. Stevinson, a corporation, was the owner in fee, in the possession

entitled to the possession of all those certain parcels nd situated in the County of Merced and the County tanislaus, State of California, described as follows:

Parcel 1—a portion of the Orestimba Rancho more particularly described as follows, to wit:

Commencing at the corner to Sections 3, 4, 9, and 10, in Township 7 South, Range 9 East, Mount Diablo Base and Meridian, and running thence South 36½° West, 11½ chains; thence North 21¾° West, 41 chains to Oak tree on bank of slough; thence South 60¼° West, 1.75 chains for place of beginning; thence with the true meridian magnetic variation 15°30′ East, North 25½° West 113.43 chains; thence North 38¼° East 51.42 chains to the left bank of the San Joaquin River; thence up said San Joaquin River with its meanderings South 58° East, 2.30 chains South 42¾° East, 1.70 chains, South 18¾° East, 5 chains; South 49° East, 5 chains; South 65° East, 6 chains; North 86½° East, 5.52 chains; North 72° East, 5 chains; North 69½° East, 9 chains; North 84° East, 9.50 chains; South 35° East, 10 chains; South ¾° East, 4.43 chains; South 11¾° West, 4 chains; South 20½° West, 3.96 chains; South 35½° West, 7 chains; North 89¼° West, 4.50 chains; South 67¾° West, 3.40 chains; South 39½° West, 7.26 chains; South 37½° East, 7.78 chains; South 47¾° East, 11 chains; South 17¾° East, 10.40 chains; South 52° West, 9.60 chains; South 79° West, 2.62 chains; South 86° West, 11.70 chains; South 77¾° West, 3.76 chains; South 56° West, 3 chains; South 41° West, 3.80 chains; South 12° East, 5 chains; South 37° East, 22.10 chains; South 5½° East, 6.25 chains; South 1½° West, 1.86 chains; South 13½° West, 2.50 chains; South 20° West, 4.25 chains; South 3½° West, 4.34 chains; South 9° West, 1.27 chains; South 20¼° East, 1.32 chains; South 21¾° East, 14.16 chains; thence leaving said South bank of San Joaquin River South 60¼° West, 19.75 chains, to place of beginning. Being portions of Sections 27, 28, 33, and 34 in Township 6 South, Range 9 East, and a part of Section 4 in Township 7 South, Range 9 East, containing 583.35 acres, more or less, being a part of the Orestimba Rancho.

Parcel 2—In Township 6 South, Range 9 East, Mount Diablo Base and Meridian, Northeast quarter of Southwest quarter of Southeast quarter, West half and Southeast quarter of Southwest quarter of Southeast quarter and Fractional Lot 3 in Section 16;

Fractional Lots 1, 2, 3 and 4 and Swamp and Overflowed Land Surveys Nos. 157 and 112, in Section 21; Fractional Lot 2 and Northwest quarter of Northwest quarter and portions of Swamp and Overflowed Land Surveys 155 and 160 in Section 27; Swamp and Overflowed Land Surveys Nos. 113, 160 and 155, Fractional Lots 1 and 2 in Section 28; portion of Swamp and Overflowed Land Survey No. 114 in Section 33, Fractional Lots Nos. 1, 2, 3, and 4, Swamp and Overflowed Land Surveys Nos. 156, 114 and 115 and East half, in Section 34; Fractional Lots 1 and 2, Northwest quarter of Southwest quarter, and Southwest quarter of Northwest quarter, in Section 35.

Parcel 3—In Township 7 South, Range 9 East, Mount Diablo Base and Meridian, Fractional Lots 1, 2, 3, 4, 5, 6 and 7, Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 67, 69 and 76 in Section 2; Fractional Lots 1, 2, 3, 4, 5, 6 and 7, West half of Northeast quarter, Swamp and Overflowed Land Surveys Nos. 85 and 67, in Section 3; Swamp and Overflowed Land Surveys Nos. 67, 330 and 236 in Section 10; Fractional Lots 1, 2, 3, 4 and 5, Northeast quarter of Northwest quarter, Northeast quarter, Swamp and Overflowed Land Surveys Nos. 330, 236, 232 (resurvey of 188), 235 (resurvey of 189), 380 and 281 and 282 in Section 11; Swamp and Overflowed Land Survey No. 232 in Section 12; Swamp and Overflowed Land Surveys Nos. 233 and 234, 385, 278, Fractional Lots 1, 2, 3 and 4 in Section 13 excepting the Easterly 40 acres of Lot 2 and the Easterly 20 acres of Lot 3; Swamp and Overflowed Land Surveys Nos. 233 and 234 in
295 Section 14; Swamp and Overflowed Land Survey No. 130 North of County Road and Fractional Lot 1 in Section 24.

Parcel 4—In Township 7 South, Range 10, East, Mount Diablo Base and Meridian, South half of Fractional Lot 1, Fractional Lot 2, and Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 19; all of Fractional Lot 2 in South half, Fractional Lots 3 and 4, Northeast quarter of Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 128, 231 (resurvey of 131), in Section 20; Fractional Lots 1, 2, 3 and 4, and Swamp and Overflowed Land Survey Nos. 124 and 127 in Section 28; Fractional Lot 1 and Swamp and Overflowed Land Surveys Nos. 128 and 231 (resurvey of 131), in Section 29; Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 30.

41. All the above-described lands lie along and border upon the channels of the San Joaquin River and are riparian thereto. Each year up to and including 1941, with a few exceptions in years of extremely low water, substantially all of the lands described as Parcel No. 1 and the lands in the remaining parcels described as swamp and overflow lands were overflowed by spring floods and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941. When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, referred to in finding 30, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

42. Deducting 255 acres of land occupied by ponds and sloughs, such overflowed land aggregated approximately 2,797 acres. The difference between the fair market value of such 2,797 acres on or about October 20, 1941, with riparian rights to the use of the waters of the San
296 Joaquin River, and the fir market value without such riparian rights was $25,173.

43. Parcels Nos. 2, 3 and 4 lie on the east side of the San Joaquin River and consist of two general groups, namely, the swamp and overflow lands adjacent to the river, and the high land adjoining the swamp and overflow lands and not immediately adjacent to the river, except in its flood stages. The high land is generally susceptible of cultivation. It is not overflowed by the spring floods but plaintiff Stevinson Corporation contends it receives benefits from the yearly flooding of the San Joaquin River by reason of seepage. It is not satisfactorily proved that such high land has been so benefited.

Some of the high land, in quantities not ascertainable from the evidence, has in the past received some water from the East Side Canal, a canal which takes out of the San Joaquin River about 15 miles southeast of the lands involved in these cases. There is no satisfactory proof of the extent, the benefit, or the value to the land of San Joaquin River water which has been or may be conveyed by this means.

44. A portion of the overflowed lands, primarily those within Parcels Nos. 1 and 2, lies north of the Merced River. Defendant contends that the flow of the Merced River contributes to the flooding of the lands below the junction and, together with other inflows, provides an adequate water supply, notwithstanding any effect which may result from the completion of the Friant Dam and the Friant-Kern and Madera Canals.

During the period of spring floods, the greater part of the flow of the Merced River is diverted many miles upstream for irrigation purposes, and the flow which reaches the San Joaquin River, combined with other upstream inflows, would not be sufficient to flood plaintiff's lands when the Friant Dam and diversion canals come into full operation.

CLAIM OF ARCHIBALD J. STEVINSON—NO. 46331

45. On December 22, 1937, the Stevinson Corporation was and for a long time prior thereto had been the owner, entitled to possession, and in possession of the following described lands and premises:

297 Fractional Lots 1, 2, 3 and 4, and Swamp and Overflow Surveys Nos. 132 and 133, in Section 27, Township 7 South, Range 10 East, M. D. B. & M., containing 432.67 acres.

On that day, the Stevinson Corporation made, executed, and delivered to plaintiff Archibald J. Stevinson a deed whereby it granted and conveyed such lands and premises to Archibald J. Stevinson.

Each year up to and including 1941, with a few exceptions in years of extremely low water, that portion of such lands described as Swamp and Overflow Surveys Nos. 132 and 133, which contained approximately 185 acres, was overflowed by spring floods and was thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

The land in Lots 1, 2, 3, and 4 is generally susceptible of cultivation. It is not overflowed by the spring floods, but plaintiff Archibald J. Stevinson contends that it receives benefits from the yearly flooding by reason of seepage. It is not satisfactorily proved that such high land has been so benefited.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

46. The difference between the fair market value of such overflowed land on or about October 20, 1941, with riparian rights to the use of the waters of the San Joaquin River and the fair market value without such riparian rights was $1,665.00.

298 CLAIM OF 3-H SECURITIES COMPANY—NO. 46,332

47. On February 21, 1933, the Stevinson Corporation was and for a long time prior thereto had been the owner, entitled to possession, and in possession of that portion of Swamp and Overflow Land Survey No. 130 lying to the south and east of the road from Gustine to Merced. On that day the Stevinson Corporation made, executed, and delivered to 3-H Securities Company its deed whereby it granted and conveyed such land to the 3-H Securities Company.

48. Each year up to and including 1941, with a few exceptions in years of extremely low water, substantially all of such lands were overflowed by the spring floods, and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

49. The difference between the fair market value of the above-described lands on or about October 20, 1941, with riparian rights to the use of the waters of the San Joaquin

River and the fair market value without such riparian rights was $234.00.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff James J. Stevinson
299 in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. On each of the judgments in each case there will be added compensation for delay in payment, computed at four percent per annum from October 20, 1941, to date of payment.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff James J. Stevinson, in the sum of twenty-five thousand one hundred seventy-three dollars ($25,173.00); in favor of plaintiff Archibald J. Stevinson in the sum of one thousand six hundred sixty-five dollars ($1,665.00); and in favor of plaintiff 3-H Securities Company in the sum of two hundred thirty-four dollars ($234.00). There will be added to the amount of the judgment in each case compensation for delay in payment, computed at four (4) percent per annum from October 20, 1941, to date of payment.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for just compensation for the taking of the water rights appurtenant to their lands on the San Joaquin River. They own lands riparian to the San Joaquin downstream from the lands of plaintiffs in *Gerlach Live Stock Company, et al.* v. *United States*, this day decided. Their riparian rights were unimpaired by any condition in their deeds or by any other agreement as in the cases in *Gerlach Live Stock Co., et al.*

The Commissioner has found that certain of plaintiffs' lands were benefited by the high waters of the San Joaquin River and certain lands were not. We concur in his findings.

For the reasons set out in *Gerlach Live Stock Company et al.* v. *United States*, we hold that these water rights were taken by defendant not later than October 20, 1941. Also for the reasons set out in *Gerlach Live Stock Company, et al.* v. *United States* we are of opinion that plaintiffs are entitled to recover therefor, and that the measure of just compensation is $9.00 per acre for the acreage benefited by

the high waters, plus compensation for delay in payment computed at 4 percent per annum from October 20, 1941, to the date of payment.

300 Judgment will be entered in favor of plaintiff James J. Stevinson in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. To each sum there is to be added compensation for delay in payment computed at 4 percent per annum from October 20, 1941, to date of payment. It is so ordered.

HOWELL, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Justice,* concur.

301 *Judgment of the Court—March 1, 1948.*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff James J. Stevinson in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. On each of the judgments in each case there will be added compensation for delay in payment, computed at four percent per annum from October 20, 1941, to date of payment.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff James J. Stevinson, in the sum of twenty-five thousand one hundred seventy-three dollars ($25,173.00); in favor of plaintiff Archibald J. Stevinson in the sum of one thousand six hundred sixty-five dollars ($1,665.00); and in favor of plaintiff 3-H Securities Company in the sum of two hundred thirty-four dollars ($234.00). There will be added to the amount of the judgment in each case compensation for delay in payment, computed at four (4) percent per annum from October 20, 1941, to date of payment.

302 *Proceedings after entry of judgment*

On May 4, 1948, on motion made therefor and allowed by the court, the defendant filed a motion for a new trial.

On June 1, 1948, the court entered the following order on said motion:

ORDER.

These cases come before the Court on Motions for New Trials by the parties and, on consideration thereof,

It is ordered, this first day of June, 1948, that said motions be, and the same are, overruled.

By the Court,
(s) Marvin Jones,
Chief Justice.

303 Clerk's Certificate to foregoing transcript omitted in printing.

305 Supreme Court of the United States
Nos. ....., October Term, 1948.

The United States, *Petitioner,*
vs.
James J. Stevinson, a corporation.

The United States, *Petitioner,*
vs.
Archibald J. Stevinson.

The United States, *Petitioner,*
vs.
3-H Securities Company.

Order Extending Time to File Petitions for Certiorari

Upon Consideration of the application of counsel for the petitioner,

It is Ordered that the time for filing petiton for writ or writs of certiorari in the above-entitled causes be, and the same is hereby, extended to and including Sept. 28, 1948.

Robert H. Jackson,
Associate Justice of the Supreme Court of the United States.

Dated this 20 day of August, 1948.

U. S. GOVERNMENT PRINTING OFFICE 801974 NO. 5....1949

Supreme Court of the United States

No. 299—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

Supreme Court of the United States

No. 300—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

Supreme Court of the United States

No. 301—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

822286—49

Supreme Court of the United States

No. 302—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 303—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 304—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1948

NOS. 299–304

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, PETITIONER

v.

3–H SECURITIES COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments entered in these cases on March 1, 1948, and April 5, 1948, by the United States Court of Claims.

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer in *Gerlach Live Stock Company* v. *United States* is reported in 102 C. Cls. 392. Its opinions after trial (R. 130–146, 191–192) are reported in 76 F. Supp. 87, 99.

JURISDICTION

The judgments of the Court of Claims in the Gerlach, J. Sheldon Potter, and Martin Erreca cases were entered on April 5, 1948 (R. 146–147).[1] A motion for new trial was denied June 28, 1948 (R. 147). Judgments were entered in the James J. Stevinson (a Corporation), Archibald Stevenson and 3–H Securities Company cases on March 1, 1948 (R. 192). A motion for new trial was denied June 1, 1948 (R. 192). On August 20, 1948, the time within which to file a petition for writs of certiorari in the Stevinson and 3–H Securities Company cases was extended by Mr. Justice Jackson to and including September 28, 1948 (R. 193). Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

[1] These judgments were in substitution for judgments originally entered March 1, 1948, which were withdrawn.

QUESTION PRESENTED

1. Whether the Court of Claims was warranted in holding, contrary to an express Congressional declaration, that the construction of the Friant Dam, as an integral part of the Central Valley Project in California, was not authorized for the purpose of aiding navigation and commerce.

2. Whether owners of riparian land have a property right in the flow of a navigable river, particularly in flood waters and flood stages.

3. Whether the judgments of the Court of Claims are deficient for failure of the court to make a finding describing the property which the court concluded was taken from respondents.

4. Whether the Court of Claims was correct in holding that there was a taking of respondents' water rights by October 20, 1941, and that just compensation must include interest from that date, even though at the time of trial nearly five years later, respondents had not been deprived of benefits from the flow of the river which they had formerly received and could not have been so deprived because various portions of the project had not been completed.[2]

---

[2] In the event that this petition for writs of certiorari is granted, additional questions will be presented whether the Court of Claims correctly construed Article XIV, section 3, of the California Constitution (Fdg. 48, R. 102–103; see R. 138–140) and whether the court was correct in holding that the exceptions in the deeds of respondents Gerlach Live Stock Company (Fdg. 39, R. 125), J. Sheldon Potter (Fdg. 51, R. 106), and Martin Erreca (Fdg. 59, R. 111) did not prevent their recovery (R. 134–138).

STATUTES INVOLVED

Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, provides:

> SEC. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided,* That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, pro-

viding for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and third, for power.

* * * * *

The relevant portion of the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, provides:

> The second proviso in section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: "*Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings, and in order to permit the full utilization of

the works constructed to accomplish the aforesaid purposes."

STATEMENT

These six cases were brought to recover just compensation for the alleged taking of property as a result of erection of the Friant Dam on the San Joaquin River, California. After a demurrer was overruled in *Gerlach Live Stock Company* v. *United States*, 102 C. Cls. 392, all the cases were consolidated by order of the court and were tried together. Two sets of findings of fact and conclusions of law were made: one applicable to the *Gerlach, Potter* and *Erreca* cases and another applicable to the two *Stevinson* and the *3–H Securities Company* cases. The issues raised and the conclusions thereon were, however, all discussed in the opinion in the *Gerlach*, etc., cases which was adopted as the opinion in the *Stevinson*, etc., cases. The facts, as found by the Court of Claims, may be very briefly summarized as follows:[3]

The Central Valley of California embraces the area drained by the Sacramento and San Joaquin Rivers, both of which meet in a common delta and empty into Suisan Bay, an arm of San Francisco Bay (Fdg. 1, R. 71). Both the Sacramento and the San Joaquin Rivers are navigable rivers

[3] Since there is little difference between the findings in the two groups of cases, references herein will be to the findings in the *Gerlach*, etc., cases.

of the United States. The present controversy relates to the right to use waters of the San Joaquin. That river has its source in the Sierra Nevada Mountains and flows westerly to Friant where it enters the valley (Fdgs. 2, 49, R. 71, 103–104). From this point, where the Government's dam is situated, it continues west some 40 miles to Mendota, where it is joined by Fresno Slough of the Kings River (Fdg. 2, R. 71). At this point the river abruptly turns north and flows 225 miles to the bay. Respondents' lands are situated in the valley north of Mendota.

In its course through the mountains the river banks are high but after it reaches Gravelly Ford, some 27 miles west of Friant, the banks are low and are overflowed in periods of high water. In the vicinity of respondents' lands the river has numerous side channels and sloughs (Fdg. 3. R. 71–72). At lowest stages the flow of the river is confined by natural banks (referred to in the findings as the "low channel"), and at higher stages is similarly confined by other banks (referred to in the findings as the "high channel") Fdg. 4, R. 72). Every year the river overflows the higher banks for a few days in each of two annual periods, from December to February and from April to June (referred to in the findings as the "overflow channel") (Fdg. 4, R. 72). The lands are moistened and enriched by such overflow (Fdgs. 3, 4, R. 71–72). Respondents own both land between the two banks and land outside of the

banks (Fdgs. 6–8, R. 73–74). These are the lands involved in these cases.

Miller & Lux, Incorporated, and its subsidiaries own large areas of land in the vicinity, and formerly owned those of respondents Gerlach, Potter, and Erreca. Upstream from respondents' lands, it has diverted and appropriated water in the river to irrigate lands owned by it and by other persons (Fdgs. 9–10, R. 74–75). A dam, known as "Sack Dam," which is located at Temple Slough some 19 miles downstream from Mendota, is annually rebuilt to irrigate land west of the river and is maintained until October or November or December (Fdg. 13, R. 76–77). Respondents recognized that various rights, including those of Miller & Lux, were entitled to be satisfied out of the waters of the river before respondents were entitled to any water (Fdgs. 12, 14, R. 76–77). Satisfaction of such prior rights "requires the entire supply of water in the river at certain times of the year, and at all times of the year in some years of exceptionally low water" (Fdg. 12, R. 76). While Sack Dam is in place, "plaintiffs do not receive and are not entitled to receive any material amount of water from the river" (Fdg. 13, R. 76).

The Central Valley project, whose principal features are the Shasta Dam on the Sacramento River, the Friant Dam on the San Joaquin River and a number of canals for the control and distribution of water, was first undertaken by the State of California. By the Act of August 30,

1935, 49 Stat. 1028, 1038, Congress appropriated $12,000,000 toward the construction of the Kennett (Shasta) Dam. In December of that year the President approved a plan for the project as set forth in a letter of the Secretary of the Interior as a Federal undertaking (Fdg. 32, R. 90). The project was reauthorized by Congress in 1937 and 1940 and large sums have been appropriated for its construction (Fdg. 36, R. 95). Execution of the plan has proceeded with certain modifications, and in November 1939 construction was commenced on the Friant Dam, which will impound water of the San Joaquin River (Fdgs. 36, 42, R. 95, 99). In October 1941 the dam was used to impound water by closing temporary outlets, the water level having been previously raised some 10 feet when the temporary openings were in use (Fdg. 43, R. 100). However, necessary valves were not installed until 1943, drum gates were not installed at the time of trial, and the diversion canals were not completed at that time (Fdgs. 44–46, R. 100–102). Thus, up to the time of the trial respondents were still receiving "all the water they ever got" (R. 141).

The United States purchased certain rights from Miller & Lux, the agreement providing for an escrow fund to pay judgments that might be recovered against the United States under certain conditions (Fdgs. 37, 38, R. 95–97). Respondents Gerlach Live Stock Company, Potter and Erreca claimed their lands through conveyances from

Miller & Lux in which that company had reserved certain rights (Fdgs. 51, 59, 79, R. 106–107, 111–112, 125–126). The court found that the lands of respondents benefited only from overflow, and in one case from seepage, as a result of spring floods of the San Joaquin River and that such benefits will be lost when the Friant Dam and the diversion canals are placed in operation (Fdgs. 56, 62, 85–87, R. 110, 113, 127–128). The court further found that except in a year of extremely high water respondents' lands would not be flooded by water from other sources combined with spills from the Friant Dam (Fdg. 47, R. 102).

In the *Gerlach* case the Government had demurred to the petition on the ground that, since Congress had declared that the Central Valley project was for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof and other purposes and had directed that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control," the prevention of the flooding of respondents' land did not constitute a taking. The court overruled this demurrer on the ground that there was nothing to negative plaintiffs' allegation that the purpose of the construction of Friant Dam was solely to irrigate certain nonriparian lands.[4] *Gerlach Live Stock*

[4] The petition (R. 1–9) contained no such allegation.

Company v. *United States*, 102 C. Cls. 392. After the trial, the court found (Fdg. 49, R. 103–104):

> The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 32–36, inclusive, no evidence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.
>
> There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

Upon these findings, judgments were entered for the respondents. The opinion of the court concluded first, that the Friant Dam was erected for the "sole and only purpose of irrigating arid and semiarid lands, and perhaps also flood control" (R. 130), and that the purpose of this flood control "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131). Next, it concluded that respondents were entitled to compensation for the loss of benefits from flood waters (R. 133). The court then concluded that respondents Gerlach Live Stock Company, Erreca and Potter were not barred from recovery because of the exceptions in their deeds (R. 134–138), nor were respondents' rights to recovery affected by Article XIV, sec. 3, of the California Constitution (R. 138–141). It further held that there had been a taking by October 20, 1941 (R. 141–145), and interest from that date was added to the amount awarded each respondent.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that there had been a taking of property of respondents.

2. In failing to give effect to the declaration and directions of Congress as to the purposes of the Central Valley project.

3. In holding that the Friant Dam was erected

solely for the purpose of irrigating arid and semi-arid lands.

4. In holding that respondents had property rights in the flow of a navigable river as against the United States.

5. In failing to define what property interests were taken.

6. In holding that there had been a taking on October 20, 1941, and in including interest from that date as a part of just compensation.

7. In holding that respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca were not barred from recovery by the reservation of water rights by their predecessor in title.

8. In holding that respondents' rights to recover were not affected by Article XIV, sec. 3, of the Constitution of the State of California.

9. In entering judgments against the United States.

REASONS FOR GRANTING THE WRIT

1. In 1937 and 1940, Congress declared that one of the purposes of the Central Valley Project was the improvement of navigation and commerce and directed that the project should be used, first, for such purposes. "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That de-

termination is legislative in character." *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527–528. Cf. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66. In *Arizona* v. *California*, 283 U. S. 423, with reference to a similar statute, it was stated (pp. 456–457), "This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose." The fact that purposes other than navigation and commerce will be served does not change the result. *Arizona* v. *California*, 283 U. S. 423, 456. Nevertheless the court here undertook to review and reject the declarations and directions of Congress.

The Court of Claims apparently took the view that the federal power to improve navigation or commerce can only be exercised by increasing the facilities for the operation of boats in the immediate vicinity of the dam. It said (R. 130): "Instead of improving navigation on the San Joaquin River the erection of this dam destroyed any possibility of navigation on the upper reaches of the river." But the federal authority is not so limited. As this Court said in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426: "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than opera-

tion of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." And validity of the exercise of the power is not to be tested simply by reference to one reach of the river as it was by the court below. Congress may destroy navigation in one part of a river to improve or preserve navigation and commerce elsewhere. *United States* v. *Commodore Park*, 324 U. S. 386; *South Carolina* v. *Georgia*, 93 U. S. 4. The decision below was based on fundamental error in ignoring these principles. This is clear from the court's own finding that there was no evidence as to the effect of Friant Dam upon navigation or commerce in other reaches of the river. That finding (Fdg. 49, R. 103–104) demonstrates that there is no evidence which would justify a conclusion that the Congressional declarations and directions are impossible of execution and may therefore be ignored.

The statement in the opinion below that the purpose of flood control, for which Friant Dam will be operated, "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131) is thus neither based upon findings nor evidence. Indeed

it is contradicted by the findings that in operation there will be spills to provide reserve storage capacity for the purpose of flood control (Fdg. 32, R. 90) and that (Fdg. 35, R. 94): "Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control." Moreover, because of the benefits which Friant Dam will contribute in controlling floods, the district engineer in 1944 stated that part of the cost of Friant Dam might be charged to flood control. H. Com. on Flood Control Doc. No. 2, 78th Cong. 2d sess.

In its ruling upon demurrer, the Court of Claims reasoned that, while Congress had declared that the entire Central Valley project was for the purpose of improving navigation, among other things, "we do not understand Congress to have meant the entire project and each integral part thereof." *Gerlach Live Stock Company* v. *United States,* 102 C. Cls. 392, 399. The court concluded that, looking at Fraint Dam alone, it is impossible to say that the dam was intended to improve navigation and "we do not think Congress meant to say it was." The same view was adhered to upon the final decision (R. 131). Thus, the conclusion below rested upon the view that the particular activity in a navigable river wich produces the damage complained of must directly improve navigation, and that in determining whether

the authority of the Federal Government over navigable waters is being exercised the fact that the particular structure constitutes simply one element of a comprehensive plan must be ignored. This is precisely the contention that was made in *United States* v. *Commodore Park,* 324 U. S. 386, where the circuit court of appeals held that the deposit of dredged material in a navigable creek was not related to commerce or navigation although the dredging of it was. This Court reversed, stating (p. 392):

> That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.

See also *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 525, 527–528; *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, 551–554.

So here, the Friant Dam was not an isolated project but was an integral part of the entire Central Valley project. It is clear that Congress treated the project as a whole, and the Friant Dam may not be excluded from the declarations of purpose and the directions as to operation of the project.

The Central Valley Project was first undertaken by the State of California in 1933, the Act declaring that it was a single project and, as to

Friant Dam specifically, that it was for "improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River" and other purposes. Cal. Water Code, secs. 11200, 11226. The project was subsequently taken over by Congress, and has since been carried on by the Federal Government.[5] An essential feature of the project from the beginning has been that excess water from the Sacramento River will be transferred to the San Joaquin basin, permitting better use of waters, especially flood waters, in the San Joaquin Valley. It is this transfer of waters stored at Shasta on the Sacramento to the San Joaquin Valley which will permit water at Friant to be stored so as to avoid floods

[5] In 1933, the Chief of Engineers submitted to Congress a report on "the comprehensive plan presented by the State authorities" (H. Doc. No. 191, 73d Cong., 2d sess; Rivers and Harbors Com. Doc. No. 3, 73d Cong., 2d sess.), and pursuant to his recommendation, Congress authorized a contribution of $12,000,000 to the project. Act of August 30, 1935; 49 Stat. 1028, 1038. See *United States* v. *Miller*, 317 U. S. 369, 370–371. The project was discussed at length in a comprehensive report in 1934 upon rivers throughout the country. H. Doc. No. 395, 73d Cong., 2d sess., pp. 322–332, 379–380. In December 1935, upon the recommendation of the Secretary of the Interior, the President approved the project as a federal undertaking (Fdg. 33, (R. 91–93). The "entire Central Valley Project" was reauthorized by Congress in the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, and the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200. Large sums have been appropriated for the project and the progress on its execution has been regularly reported to Congress. Fdg. 36, R. 95, Annual Reports, Sec'y of the Interior.

in the Valley and to be diverted to irrigation purposes. The Friant Dam is thus clearly to be "viewed not in isolation but as part of a comprehensive, integrated * * * system," *Oklahoma v. Atkinson Co.*, 313 U. S. at 527, for the multiple purposes of navigation improvement, flood control, and irrigation.*

The declarations of Congress in 1937 and 1940 were advisedly directed to "the entire Central Valley project, California," and its statement of purpose that the project was for "improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of stored waters thereof" embraced all the elements of the project. For these reasons, the conclusion that "the purpose of the construction of this dam was to irrigate certain nonriparian lands, and not in aid of navigation" (R. 131), is believed to be erroneous. The issue is important in the prosecution of works for the improvement of river basins in the combined interests of all parties

* The method of transfer of these waters has been altered in that rather than using dams and pumping plants in the San Joaquin River, the transfer will be accomplished by gravity flow in the Delta-Mendota Canal (Fdg. 33, 34, R. 91-94). This modification does not change the essential purpose of the project, nor does it alter the fact that the exchange of water from the Sacramento to the San Joaquin River is a basic element of the comprehensive plan. See S. Doc. No. 142, 79th Cong., 2d sess., p. 23; H. Doc. No. 649, 78th Cong., 2d sess., pp. 28, 47.

concerned. And this is the first time that a congressional declaration that a project is for the purpose of improving navigation and commerce has been held for naught by a court.

2. Respondents are not complaining that a Government project is flooding their lands (cf. *United States* v. *Dickinson*, 331 U. S. 745); they are insisting that they have a right to be flooded with which the Government cannot interfere under its power over navigable streams. In the state of nature, the San Joaquin River annually overflowed above its natural channel, flooding riparian lands and thereby moistening and enriching them and promoting the growth of vegetation for pasturage. The result of operation of Friant Dam and the diversion canals will be to deprive the lands of this benefit. Compensation was awarded for this deprivation (Fdgs. 56, 57, 85, R. 110, 127), and in one case for the loss of subirrigation by seepage from the main channel (Fdg. 62, R. 113).

Thus, the result of the decision below is a holding that respondents have a right to the natural overflow of a navigable stream—that is, to floodwater. But this Court has several times held that, as against the United States, riparian landowners do not have a property right in the continued flow of a navigable stream for which they are entitled to compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; *United States* v. *Willow River Co.*, 324 U. S. 499, 507–

508. In *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, this Court stated:

> The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

The fact that as between private individuals, riparian rights in the waters of navigable rivers are recognized is not controlling. As this Court said in *United States* v. *Willow River Co.*, 324 U. S. 499, 510:

> Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

3. In *United States* v. *Causby*, 328 U. S. 256, 267, this Court held that the Court of Claims is under a duty to make a finding accurately describing the property interest taken. No such finding was made in the instant case. The findings recognize that respondents' rights to use the water are

inferior to other rights. In view of the nature of water rights and considering the character of the Central Valley project, which will involve further development in the future, it is especially important that the interest vested in the United States as a result of these proceedings be precisely described.

4. By October 20, 1941, Friant Dam was sufficiently complete so as to impound water and this was done to a minor extent by November 11, 1941. However, the necessary valves were not available until 1943 and the drum gates had not been installed at the time of trial (Fdgs. 45, 46, R. 101–102). The Madera Canal through which part of the water will be diverted was completed in 1944, and the Friant-Kern Canal was not completed at the time of trial (Fdgs. 34, 46, 56, 94, 101, 110). As the opinion of the court stated, "It is true that plaintiffs are still getting all the water they ever got because defendants' project has not yet advanced to the stage where their water has been cut off" (R. 141, see Fdgs. 56, 75, 85, R. 110, 124, 127).

Nevertheless, the Court of Claims held that a taking had occurred by October 20, 1941 (R. 141–145), and interest which, at the present time, would amount to approximately $26,320.00 was awarded from that date.

In the instant case, it was physically impossible in October 1941 to deprive respondents of waters since the valves and gates had not been installed nor had the diversion canals been completed.

Indeed, at that time, even the year in which respondents' property would first be affected could not be foretold. The situation would seem to be comparable to that in *Danforth* v. *United States,* 308 U. S. 271, where this Court held that there was no taking and hence interest was not paid when the setback levee had been completed but the river bank levee at the fuse plug had not been lowered from its previous height. In the *Danforth* case, the lands had not been subjected to any burden, actually experienced, of caring for greater floods. Here, the converse is true. Subsequent to October 1941, respondents' lands still received all the water they ever got. To require the payment of interest under such circumstances would seem to be "unjust to the public." *Bauman* v. *Ross,* 167 U. S. 548, 574. The cases cited by the Court of Claims (*United States* v. *Dickinson,* 331 U. S. 745; *Hurley* v. *Kincaid,* 285 U. S. 95; *United States* v. *Sponenbarger,* 308 U. S. 256, and *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327) dealt with different factual situations and were not concerned with the problem of interest; the *Danforth* case would seem to state the correct principle and to be most closely in point.

5. The issues herein presented are important in the execution of similar governmental projects, and there is probable conflict with decisions of this Court on each of the points we have discussed. Moreover, there are now pendir[illegible] in the

Court of Claims twenty-seven cases in which the plaintiffs seek to recover compensation in the total amount of $1,936,504.44 because of construction of the Friant Dam. Eleven similar cases involving claims for $101,300.00 are pending in the United States District Court for the Southern District of California. In addition, seven injunction cases are pending; two in the United States District Court for the District of Columbia; four in the United States District Court for the Southern District of California, and one in the Superior Court, Fresno County, California. A review of the instant cases will authoritatively determine the principles which will control all of the pending cases.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for writs of certiorari should be granted.

Respectfully.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 299

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

No. 300

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

No. 301

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

No. 302

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

No. 303

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

No. 304

UNITED STATES OF AMERICA, PETITIONER

v.

3-H SECURITIES COMPANY

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer in *Gerlach Live Stock Company* v. *United States* is reported in 102 C. Cls. 392. Its opinions after trial (R. 130–146, 191–192) are reported in 76 F. Supp. 87, 99.

JURISDICTION

The judgments of the Court of Claims in the Gerlach, J. Sheldon Potter, and Martin Erreca cases, Nos. 299, 300 and 301, were entered on April 5, 1948 (R. 146–147).[1] Motions for new trial were denied June 28, 1948 (R. 147). Judgments were entered in the James J. Stevinson (a Corporation), Archibald Stevinson and 3-H Securities Company cases, Nos. 302, 303 and

[1] These judgments were in substitution for judgments originally entered March 1, 1948, which were withdrawn (R. 70).

304, on March 1, 1948 (R. 192). Motions for new trial were denied June 1, 1948 (R. 192). On August 20, 1948, the time within which to file a petition for writs of certiorari in the Stevinson and 3–H Securities Company cases was extended by Mr. Justice Jackson to and including September 28, 1948 (R. 193). The petition for writs of certiorari was filed on September 24, 1948, and was granted on December 6, 1948. Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims was warranted in holding, contrary to an express congressional declaration, that the construction of the Friant Dam, which is an integral part of the Central Valley project in California, was not authorized for the purpose of aiding navigation and commerce.

2. Whether owners of land riparian to a navigable river have a property right in the flow of the river, particularly in flood waters and flood stages.

3. Whether respondents have a property right in the uncontrolled flooding of their lands in view of the provision of the California Constitution limiting rights in waters to reasonable beneficial use by reasonable methods of use and reasonable methods of diversion.

4. Whether respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca

are barred from recovery because of the exceptions contained in the deeds through which they derive title to their lands.

5. Whether Congress has assumed an obligation, which would otherwise not exist, to pay respondents for damages to their lands caused by interference with the flow of the navigable stream.

6. Whether the judgments of the Court of Claims are deficient for failure of the court to make a finding describing the property which the court concluded was taken from respondents.

7. Whether the Court of Claims was correct in holding that there was a taking of respondents' property by October 20, 1941, and that just compensation must include interest from that date, even though at the time of trial nearly five years later, respondents had not been deprived of benefits from the flow of the river which they had formerly received and could not have been so deprived because various portions of the project had not been completed.

STATUTES INVOLVED

Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, provides:

> SEC. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions

of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided*

further, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and third, for power.

* * * * * * *

The relevant portion of the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, provides:

The second proviso in section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: "*Pro-*

vided further, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes."

Other statutes are set out in the Appendix, *infra,* pp. 81–96.

STATEMENT

These six cases were brought to recover just compensation for the alleged taking of property as a result of erection of the Friant Dam on the San Joaquin River, California. After a demurrer was overruled in *Gerlach Live Stock*

Company v. *United States*, 102 C. Cls. 392, all the cases were consolidated by order of the court and were tried together. Two sets of findings of fact and conclusions of law were made: one applicable to the *Gerlach, Potter* and *Erreca* cases, Nos. 299, 300 and 301, and another applicable to the two Stevinson and the *3–H Securities Company* cases, Nos. 302, 303 and 304.[2] The issues raised and the conclusions thereon were, however, all discussed in the opinion in the *Gerlach,* etc., cases which was adopted as the opinion in the *Stevinson,* etc., cases. The facts, as found by the Court of Claims, may be briefly summarized as follows:[3]

The Central Valley of California, some 450 miles long, lies between the Sierra Nevada Mountains on the east and a fringe of mountain chains on the west. The Sacramento River drains the northerly two-fifths of the valley and the San Joaquin River the southerly three-fifths. These rivers meet in a common delta and empty into Suisan Bay, an arm of San Francisco Bay (Fdg. 1, R. 71). Both the Sacramento and the

[2] A seventh case, *Martin Erreca, et al.*, No. 46247, was also considered in conjunction with the *Gerlach, Potter* and *Erreca* cases, but recovery therein was denied and that case is not now before this Court (see *Erreca* v. *United States*, certiorari denied, No. 238, this Term).

[3] Since there is little difference between the findings in the two groups of cases, generally references herein will be to the findings in the *Gerlach,* etc., cases, Nos. 299–301. The findings in the *Stevinson,* etc., cases, Nos. 302–304, will be referred to as "St. Fdgs. —."

San Joaquin are navigable rivers of the United States (Fdg. 49, R. 103). The present controversy relates to the ownership and the right to use waters of the San Joaquin. That river has its source in the Sierra Nevada Mountains and flows westerly to Friant, where it enters the valley (Fdg. 2, R. 71). From this point, where the Government's dam is situated, it continues west some 40 miles to Mendota, where it is joined by Fresno Slough of the Kings River (Fdg. 2, R. 71). At this point the river abruptly turns north and flows some 225 miles to the bay. Respondents' lands are situated in the valley north of Mendota, and between Friant and respondents' lands certain tributaries empty into the San Joaquin and contribute water in varying amounts to the river's flow (Fdg. 2, R. 71, St. Fdg. 4, R. 161).

In its course through the mountains and for some distance after it enters the valley, the river banks are so high as to preclude overflow. However, after the river reaches Gravelly Ford, some 27 miles west of Friant, the banks become relatively low and during periods of high or flood water the river flowed out of its banks, and at such times flowed through numerous side channels and sloughs (Fdg. 3, R. 71–72). In the vicinity of respondents' lands the flow of the river at lowest stages was confined by natural banks to a sandy channel (referred to in the findings as the "low channel") between lands which were granted to the State of California as swamp and

overflow lands under the Swamp Land Act of September 28, 1850, 9 Stat. 519. At higher stages the waters spread over such swamp lands to natural banks which had been surveyed shortly after 1850, this wider channel being referred to as the "high channel." The flow of the river has been variable in quantity both over the years and in periods within the years. However, in every year of ordinary flow the river overflows the high banks into the upland area for a few days in each of two annual periods from December to February and April to June (Fdg. 4, R. 72). The lands are moistened and enriched by such overflow (Fdgs. 3, 4, R. 71–72). Respondents own both land in the high channel and land outside the banks of the river (Fdgs. 6–8, R. 73–74). These are the lands involved in these cases.

Miller & Lux, Incorporated, and its subsidiaries, own large areas of land in the vicinity and formerly owned those of respondents Gerlach, Potter and Erreca. Upstream from respondents' lands it has diverted and appropriated large quantities of water to irrigate lands owned by it and by other persons, some of the lands being riparian to the river and others not (Fdgs. 10–11 R. 75–76). Also, dams and reservoirs had been installed by power companies above Friant Dam which materially altered the flow of the river (Fdgs. 14, 15, R. 77–78). There were other rights which were entitled to be satisfied out of the waters of the river before the lands of re-

spondents became entitled to the use of any water (Fdg. 21, R. 82–84), and an earthen dam, known as "Sack Dam," located at Temple Slough some 19 miles downstream from Mendota but upstream from respondents' lands, is annually rebuilt to irrigate land west of the river and is maintained until October, November or December (Fdg. 13, R. 76–77). While Sack Dam is in place "all the water remaining in the river at that point is diverted and plaintiffs do not receive and are not entitled to receive any material amount of water from the river" (Fdg. 13, R. 77). Hence, satisfaction of the various prior rights "require the entire supply of water in the river [at Temple Slough] at certain times of the year, and at all times of the year in some years of exceptionally low water" (Fdg. 12 R. 76). Other streams contribute water to the river between Temple Slough and respondents' lands (Fdgs. 2, 47, R. 71, 102).

The United States purchased certain rights from Miller & Lux, the agreement providing for an escrow fund to pay some judgments that might be recovered against the United States under certain conditions (Fdgs. 37, 38, R. 95–97). Respondents Gerlach Live Stock Company, Potter and Erreca claimed their lands through conveyances from Miller & Lux, subject in one case (Potter) to existing water rights of the company and to the right of the company to sell or convey any water right already established and to store

and/or change the place of use of such water, and, in the other cases (Gerlach and Erreca), subject to the water rights of the company to the end that the company may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River.[4] (Fdgs. 51, 59, 79, R. 106–107, 111–112, 125–126). The provisions of the escrow fund include the claims of respondents Gerlach and Potter and part of the claim of Martin Erreca, but not the claims of respondents James J. Stevinson, a corporation, Archibald Stevinson and 3–H Securities Company.

The Central Valley Project, whose principal features are the Shasta Dam on the Sacramento River, the Friant Dam on the San Joaquin River and a number of canals for the control and distribution of water, was first undertaken by the State of California. In H. Com. on Rivers and Harbors, Doc. No. 35, 73d Cong. 2d sess., the project was described, and the Chief of Engineers concluded that a federal contribution of $12,000,000 toward the construction of the Kennett (Shasta) Dam would be warranted. By the Act of August 30, 1935, 49 Stat. 1028, 1038, the work described in Doc. No. 35 was authorized. In December of that year the President approved a plan for the project as set forth in a letter of the Sec-

[4] These contractual provisions are discussed in the Argument, *infra*, p. 56.

retary of the Interior as a federal undertaking under the Emergency Relief Appropriation Act of 1935 (Fdg. 32, R. 90).

The plan in brief provided for the storage of the water of the Sacramento River by means of the Shasta Dam, and the release of that water for purposes of maintaining adequate navigation and irrigation in that river and in the delta region of the Sacramento and the San Joaquin. The amount of Sacramento water was sufficiently great to permit its use to supply the lower San Joaquin Valley, and the plan contemplated the pumping of Sacramento water 150 miles up the San Joaquin Valley as far as Mendota. This use of surplus Sacramento water permits storage of substantially all of the water of the San Joaquin in the Friant Reservoir, which is located at the point where the San Joaquin leaves the mountains and enters the valley. At Friant the water of the San Joaquin would be diverted northward and southward through the proposed Madera and Friant-Kern Canals to provide adequate water for the irrigation of developed lands in those areas. The Friant Reservoir will also prevent floods in the lower San Joaquin Valley; some water will be allowed to flow through the Friant dam for the purpose of reserving vacant storage space in the reservoir for flood control. (Fdgs. 32–36, R. 90–95). Other water enters the San Joaquin below the Friant Dam and above respondents' lands, but not in

sufficient amounts to flood the lands in question. (Fdg. 47, R. 102).

Both the Sacramento and the San Joaquin are navigable rivers, and it is unquestioned that the operation of the Shasta Dam will aid the navigation of the Sacramento. It is also undisputed that the lower San Joaquin from Stockton to Suisan Bay is navigable. The only other evidence as to navigability on the San Joaquin indicated that when the project came to full operation substantially all the flow of the river would be stopped at Temple Slough (Sack Dam) in most years (Fdg. 49, R. 103, Fdg. 13, R. 77). "No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods." (R. 104.)

The project was reauthorized by Congress in 1937 and 1940 and large sums ($113,750,000 up to 1941) have been appropriated for its construction (Fdg. 36, R. 95). Execution of the plan has proceeded with certain modifications, and in November 1939 construction was commenced on the Friant Dam, which will impound water of the

San Joaquin River (Fdgs. 36, 42, R. 95, 99). In October 1941 the dam was used to impound water by closing temporary outlets, the water level having been previously raised some 10 feet when the temporary openings were in use (Fdg. 43, R. 100). However, necessary valves were not installed until 1943, drum gates were not installed at the time of trial in 1946, and one of the diversion canals was not completed at that time (Fdgs. 44–46, R. 100–102). Thus, up to the time of the trial respondents were still receiving "all the water they ever got" (R. 141).

In addition to the facts outlined above, the court below found that respondents' lands are only benefited during a relatively short period at the peak of the spring floods which flow over the lands and moisten and enrich them, the larger part of the flow eventually discharging into Suisan Bay (Fdg. 28, R. 87–88; Fdgs. 56, 85–86, R. 110, 127–128; St. Fdgs. 41, 45, 48, R. 188, 189, 190). The court further found that "Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941", but that when the Friant-Kern canal is completed the planned operation of the dam and the canals will prevent the further overflowing of respondents' lands by spring floods (Fdgs. 56, 85, R. 110, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190), and that except in years of extremely high water the combined flows of spills from Friant Dam, and from other streams, would not flood respondents' lands (Fdg.

47, R. 102; St. Fdg. 37, R. 183–184). In the case of Martin Erreca, No. 301, the tract had been protected by dikes and benefited from subirrigation by seepage and by periodic pumping from a pool on the main channel. The court found that operation of Friant Dam and the canals "will completely stop pumping from the spring high waters, except in years of unusually high flow, and will deprive the tract of all benefit from subirrigation" (Fdg. 62, R. 113). In each case the court determined the difference between the fair market value of the lands "with riparian rights to the use of the water of the San Joaquin River, and the fair market value without such riparian rights" (Fdgs. 57, 63, 87, R. 110, 113, 128; St. Fdgs. 42, 46, 49, R. 188, 190, 190–191).

Upon these findings, judgments were entered for the respondents. The opinion of the court concluded first that the Friant Dam was erected for the "sole and only purpose of irrigating arid and semiarid lands, and perhaps also flood control" (R. 130), and that the purpose of this flood control "was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands" (R. 131).[5] Next, it con-

[5] In the *Gerlach* case the Government had demurred to the petition on the ground that, since Congress had declared that the Central Valley project was for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof and

cluded that respondents were entitled to compensation for the loss of benefits from flood waters (R. 133). The court then concluded that respondents Gerlach Live Stock Company, Erreca and Potter were not barred from recovery because of the exceptions in their deeds (R. 135–138), nor were respondents' rights to recovery affected by Article XIV, sec. 3, of the California Constitution (R. 138–141). It further held that there had been a taking by October 20, 1941 (R. 141–145), and interest from that date was added to the amount awarded each respondent.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that there had been a taking of property of respondents.

2. In failing to give effect to the declaration and directions of Congress as to the purposes of the Central Valley project.

3. In holding that the Friant Dam was erected solely for the purpose of irrigating arid and semi-arid lands.

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other purposes and had directed that "the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control," the prevention of the flooding of respondents' land did not constitute a taking. The court overruled this demurrer on the ground that there was nothing to negative plaintiffs' allegation that the purpose of the construction of Friant Dam was solely to irrigate certain non-riparian lands. *Gerlach Live Stock Company* v. *United States*, 102 C. Cls. 392.

4. In holding that respondents had property rights in the flow of a navigable river as against the United States.

5. In failing to define what property interests were taken.

6. In holding that there had been a taking on October 20, 1941, and in including interest from that date as a part of just compensation.

7. In holding that respondents Gerlach Live Stock Company, J. Sheldon Potter and Martin Erreca were not barred from recovery by the reservation of water rights by their predecessor in title.

8. In holding that respondents' rights to recover were not affected by Article XIV, sec. 3, of the Constitution of the State of California.

9. In entering judgments against the United States.

SUMMARY OF ARGUMENT

I

A. In authorizing the Central Valley project, Congress declared that it is for the purpose of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods and other purposes; and directed that the dams and reservoirs be operated first for river regulation, improvement of navigation and flood control.

The Court of Claims held the congressional declaration invalid as to the Friant Dam, on the

ground that this portion of the project did not aid navigation but rendered the upper reaches of the San Joaquin less navigable than before. But it is well settled by decisions of this Court that improvement of navigability is only a part of the commerce control over navigable streams which also includes flood protection, watershed development and recovery of cost of improvements through utilization of power. *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Here the Friant Dam will be operated in the interests of flood control and irrigation, and not, as the opinion states, solely for purposes of irrigation.

Moreover, the Friant Dam is only one portion of the Central Valley Project. The acts of Congress relating to the Central Valley Project and the reports submitted to it show that Congress treated the entire undertaking as an entity with the purpose of exercising its authority over navigable streams, and that each element, *including* Friant Dam, was authorized in the exercise of that authority. The Court of Claims was not warranted in isolating Friant Dam from the comprehensive project of which it is a part. There is no constitutional justification for viewing each structure separate from the unified program for the connected body of waters. *United States* v. *Commodore Park*, 324 U. S. 386, is decisive as to this, since it shows that a project must be treated as an integral whole even though it involves two bodies of navigable water the navigability of one

of which was destroyed, and where the impairment of riparian property values resulted directly from that portion of the plan which rendered one body of water non-navigable.

B. Repeated decisions of this Court have established that "the flow of a navigable stream is in no sense private property," and that riparian owners do not have a vested right thereto, in the development of power therefrom, or in securing economic benefit from their proximity to the river in other ways so that they may demand compensation when the flow is altered by the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Commodore Park*, 324 U. S. 386; *United States* v. *Willow River Co.*, 324 U. S. 499. The result is no different when, as here, the economic benefit enjoyed by a riparian owner is a "water right" to irrigate lands in an arid state. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.

II

Respondents had no property rights to uncontrolled flooding of their lands under California law. As a result of a decision holding that a riparian owner had a vested right in the natural flow of a stream, including annually recurring floods, California amended its Constitution so as to deny a right to "waste or unreasonable use or unreasonable method of use of water." In the

instant case respondents benefit only from the peak of spring floods, the larger part of which flows down the valley and is not used for irrigation. This is an unreasonable use and method of use of the water. Under the California Constitution respondents have no property rights in water which can benefit their lands only by wasting a major portion of the flow.

III

Respondents Gerlach, Potter and Erreca were barred from recovery by reservations in the deeds under which they held title. These deeds reserved to the grantor the right to permit storage on the upper reaches of the river. The United States has succeeded to the rights so reserved. It is clear from the findings in this case that it is the storage, not the diversion of water (as stated by the court below) upon which the judgments are based. The construction given to the reservation in the third instance (J. Sheldon Potter) renders it nugatory.

IV

Respondents seek to support the judgments on the ground that Congress has assumed liability to them. But there is no such assumption of liability.

A. The legislation relating to the Central Valley project simply referred to the purchase of water rights or of water used for the irrigation of pasture lands, and appropriated funds which

might be used for that purpose amongst others. These authorizations fall far short of a direction that compensation shall be paid to respondents or others similarly situated, such as is necessary to establish a statutory right to compensation. *Mitchell* v. *United States*, 267 U. S. 341.

B. The Reclamation Act of 1902 has been made applicable to the Central Valley Project. But that Act simply recognized rights existing under local law, and did not grant private rights in the flow of navigable streams as against the United States. Almost contemporaneously with the passage of the Act, it was construed as not creating property rights in the flow of navigable streams, and this interpretation has been accepted for over forty years.

C. Section 1 (b) of the Flood Control Act of 194[illegible] merely states a general policy for the future as to the considerations which should be given the interests of the Western States in irrigation in planning projects in those areas. It says nothing as to the rights of riparian owners, and grants no new rights of compensation.

V

The Court of Claims was under a duty to make findings containing an "accurate description of the property taken." *United States* v. *Causby*, 328 U. S. 256, 267. No such finding was made here. It is especially important here that the "water rights" which may have been taken be described

with precision so as to avoid any controversy in the future.

VI

Interest was awarded from October 20, 1941, on the ground that the property had been taken at that time. Although on that date some water was impounded in the dam, it was not then placed in complete operation and could not have been because the diversion canals were not completed and controls were not then installed. The result was that respondents were not then deprived of any benefits to which they were entitled, and this condition still prevailed at the time of trial in 1946. Under these facts, there was not a taking of property from respondents in 1941 which would require an award of interest from that date but simply a prospect that sometime in the future there would be a taking. *Danforth* v. *United States*, 308 U. S. 271. To award interest for a period during which respondents enjoyed all their former rights is not required by the Fifth Amendment.

ARGUMENT

I

THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS, AND RESPONDENTS HAVE NO PROPERTY RIGHTS AGAINST THE UNITED STATES IN THE FLOW OF SUCH STREAMS

The court below rejected the contention of the United States that the Friant Dam was erected

in the exercise of the federal authority over navigable streams and that respondents had no property rights in the flow of the stream nor in the flood stages thereof. We shall show that the Friant Dam was properly authorized in exercise of the federal power over navigation and commerce, and that respondents had no property rights in the flow or flood stages of the San Joaquin River as against the United States.

A. THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS

In the Rivers and Harbors Act of August 26, 1937, sec. 2, 50 Stat. 844, 850, and again in the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, Congress provided that "the entire Central Valley project * * * is * * * declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof * * *." The 1937 Act further provided "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control." The Court of Claims was not, we submit, authorized to reject this congressional determination.

In *Arizona* v. *California*, 283 U. S. 423, it was stated with reference to a similar statute (pp.

456–457), "This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose." Again, in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, this Court said (p. 527): "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character."

Although the congressional declarations related to the entire Central Valley Project, the Court of Claims has held it valid only as to the Shasta Dam, which the court characterized as "the only part of the entire project that could be said to have been in aid of navigation" (R. 131). The position of the court seems to be that the federal power to improve navigation and commerce can only be exercised by increasing facilities for the operation of boats in the vicinity of the dam. The court stated in its opinion (R. 130–131) that "Instead of improving navigation on the San Joaquin River the erection of this [Friant] dam destroyed any possibility of navigation on the upper reaches of the river"; and that "The effect of the erection of this dam was to make the San Joaquin River throughout its course less navigable than it had been before, and for many miles

on the upper reaches of the river it converted it into a dry river bed."

We submit that the decision below is demonstrably erroneous for several reasons. In the first place Congress established the Central Valley Project as an integral whole and concluded that the purpose of the entire Project was to improve navigation. Without denying this, the Court of Claims held that if a portion of the Project did not directly benefit navigation, the purpose and effect of the Project as a whole was irrelevant insofar as that portion of the Project was concerned. We think the Court of Claims should not have segregated what Congress quite properly treated as a unit.

In the second place, the court's own findings show that the Friant Dam was designed to prevent floods in the San Joaquin Valley, and that it would be operated for that purpose as well as for the storage of water for irrigation. This Court has indicated that flood control is an appropriate basis for federal regulation of navigable streams. Floods impair navigability and commerce in many ways. If we assume that there would be commercial navigation of only the lower reaches of the San Joaquin, nevertheless prevention of floods in the upper river could reasonably be thought to be an aid to commerce. *Oklahoma v. Atkinson Co.*, 313 U. S. 508.

1. The Central Valley Project should be viewed as a whole

In overruling the Government's demurrer, that court reasoned that, while Congress had declared that the entire Central Valley project was for the purpose of improving navigation, among other things, "we do not understand Congress to have meant the entire project and each integral part thereof." *Gerlach Live Stock Company* v. *United States,* 102 C. Cls. 392, 398. The court concluded that, looking at the Friant Dam alone, it is impossible to say that the dam was intended to improve navigation and "we do not think Congress meant to say it was." 102 C. Cls. 399. This was said despite the direction in the statute "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; * * *." The same approach was taken upon the final decision (R. 130–131). Thus, in determining the scope of the constitutional power the court confined its consideration to the particular structure involved, ignoring the fact that it constituted simply one element of a comprehensive plan.

The scope of the federal power is not to be tested by reference to the effect of the dam upon one reach of the river adjoining the dam. Indeed, Congress may destroy navigation in one part of a river to improve or preserve navigation and commerce elsewhere (*United States* v. *Com-*

modore Park, 324 U. S. 386; *South Carolina* v. *Georgia*, 93 U. S. 4),-and may permit what would otherwise be an obstruction to navigation, e. g., a bridge, in order to serve other means of commerce (*Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421).

The *Commodore Park* case also involved two bodies of navigable waters, although on a smaller scale. In that case, as is claimed to be true here, the navigability of one was destroyed. This Court nevertheless held that the project was to be regarded as a whole, saying (pp. 392–393):

> While this project touched two separate, although closely related, bodies of navigable waters, and looked to improvement of shore as well as water facilities, the entire program as to the waters was designed to achieve one closely integrated unit. That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.
>
> Thus, having power under the Commerce Clause to obstruct navigation by depositing the dredged soil in Willoughby Bay, the government was likewise authorized to deposit in Mason Creek for the same purpose. There is power to block navigation at one place to foster it at another. Whether

> this blocking be done by altering the stream's course, by lighthouses, jetties, piers, or a dam made of dredged material, the government's power is the same and in the instant case is derived from the same source—its authority to regulate commerce.

It was also contended in the *Commodore Park* case that the deposit of the dredged materials in the navigable creek was for the purpose of improving shore facilities at the Naval Base, not navigation, just as it is here argued that the purpose of the part of the Central Valley Project which impaired the value of respondent's lands was irrigation and not to aid navigation. But this Court held that (pp. 391–392):

> The "fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power." *Arizona* v. *California,* 283 U. S. 423, 456.

The holding in the *Commodore Park* case was that the owner of riparian property was not entitled to compensation because of the impairment of the value of his property resulting from the destruction of the navigability of the immediately adjacent waters as a part of a project one of whose objects was to improve navigation elsewhere. This decision shows both that a project must be treated as an integral whole and that it

is immaterial that impairment of riparian property values results directly from a portion of the plan which may not of itself aid navigation.

Similarly, in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, this Court emphasized the fact that the particular dam involved was part of a comprehensive flood-control program for the Mississippi, stating (p. 525), "Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river."

So here, the Friant Dam was not an isolated structure, but was an integral part of the entire Central Valley Project. It is clear that Congress treated the Project as a whole, that the primary purpose of Congress in authorizing the Project was to exercise its authority over navigation and commerce, and, hence, that Friant Dam may not be excluded from the congressional declarations as to the purposes of the Project and its directions as to its operation.

The Central Valley Project was first undertaken by the State of California in 1933. The State statute declared that it was a single project and, as to Friant Dam specifically, that it was for "improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River" and other purposes. Cal. Water Code, secs. 11,200, 11,226. In 1933, the Chief of Engineers submitted to Congress a report

on the Sacramento and San Joaquin Rivers (H. Doc. No. 191, 73d Cong. 2d sess.) in which he stated (pp. 4–5), "The comprehensive State plan for the conservation of water resources in the Central Valley affords, in my opinion, the best general plan for the improvement of the Sacramento and San Joaquin Rivers for navigation and for the prosecution of this work in combination with the development of water power, the control of floods, and the needs of irrigation." And in 1934, the problems of the Sacramento and San Joaquin River valleys were discussed at length in connection with a comprehensive report upon rivers throughout the country. H. Doc. No. 395, 73d Cong. 2d sess. pp. 322–332, 379–380. Both reports emphasized the comprehensive nature of the Central Valley Project for the integrated development of the Sacramento and San Joaquin River systems to serve all interests. In April 1935, the Senate and Assembly of California memorialized Congress to make federal funds available for the project. In H. Com. on Rivers and Harbors, Doc. No. 35, 73d Cong. 2d sess., the project was described, and the Chief of Engineers concluded that federal participation to the extent of $12,000,000 towards construction by the State of California of the Kennett (Shasta) Dam, one part of the Central Valley Project, would be warranted. By the Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, the work described in Doc. No.

35 was authorized. See H. Rep. No. 424, 74th Cong. 1st sess. pp. 53–54. Cf. *United States* v. *Miller*, 317 U. S. 369, 370–371.

In December 1935, upon the recommendation of the Secretary of the Interior, the Central Valley Project was approved by the President as a federal undertaking (Fdg. 33, R. 91–93). Thereafter, in the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850, and the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200, the "entire Central Valley project" was reauthorized by Congress in the combined interests of navigation and flood control, power production and irrigation. An essential feature of the project from the beginning has been the transfer of excess water from the Sacramento River to the San Joaquin basin, permitting better use of waters, especially flood waters, in the San Joaquin Valley. It is this transfer of waters which will permit the storage of water at Friant so as to avoid floods in the Valley and allow diversion of the water for irrigation.[6] The transferred

[6] The method of transfer of these waters has been altered in that rather than using dams and pumping plants in the San Joaquin River, the transfer will be accomplished by gravity flow in the Delta-Mendota Canal (Fdgs. 33, 34, R. 91–94). This modification does not change the essential purpose of the project, nor does it alter the fact that the exchange of water from the Sacramento to the San Joaquin River is a basic element of the comprehensive plan. See S. Doc. No. 142, 79th Cong., 2d sess., pp. 23, 44; H. Doc. No. 649, 78th Cong., 2d sess., pp. 28, 47. The court's findings demonstrate the error of the statement of the court in its ruling upon de-

water provides for the needs of most of the San Joaquin Valley, and this in turn permits the impounding at Friant which protects the Valley against floods.

This history demonstrates that the project has been treated throughout as a single comprehensive development and that Congress spoke advisedly when it declared that the "entire Central Valley Project" was for the purpose of improving navigation and commerce, for reclamation of arid lands and for power production. As the general report on rivers throughout the United States submitted to Congress in 1934 stated (H. Doc. No. 395, 73d Cong., 2d sess., p. 328):

> The comprehensive plan for the further development of the water resources of the Central Valley includes the construction of a series of foothill reservoirs for the regulation of stream flow in the combined interests of irrigation, salinity control, flood control, power development, and navigation; the construction of canals and conduits for the transportation of water to points of use; the installation of power facilities at the foothill reservoirs; and the improvement of the Sacramento and San Joaquin Rivers for navigation.

Thus, the Central Valley Project is an outstanding example of the integration of various dams, reservoirs, etc., in the combined interests of all

murrer that the portion of the project providing for transfer of water from the Sacramento to the San Joaquin Valley had been abandoned (102 C. Cls. at p. 397).

concerned. And Congress has stated that the first purpose for which the entire project was undertaken and for which it will be operated is the promotion of navigation and commerce. Congress was amply justified in so treating the project as an entity, and hence, the court below was not warranted in isolating Friant Dam from the entire project. Similarly, this Court in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, with reference to 157 reservoir projects throughout the tributaries of the Mississippi, said (pp. 527–528):

> To say that no one of those projects could be constitutionally authorized because its separate effect on floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole. That reveals the necessity, from the constitutional viewpoint, of leaving to Congress the decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods.

Moreover, in the instant case, Congress, in addition to declaring that the entire Central Valley Project was for the purposes of navigation and commerce and other purposes, directed "That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation and flood control". Act of August 26, 1937, 50 Stat. 844, 850. Respondents at least had the burden of showing that it is impossible to use Friant Dam for

such purposes. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *Arizona* v. *California*, 283 U. S. 423, 455–456. There is neither finding nor evidence that such is the case.

2. The prevention of floods by the Friant Dam must be assumed to be an aid to commerce in the absence of any showing to the contrary

The court below declared in its opinion (R. 131) that the purpose of the Friant Dam was "irrigation" and not an "aid of navigation." The opinion recognized that a purpose was "flood control", but stated that the sole purpose of this was to use the water to irrigate arid lands (R. 131). The latter statement, however, is inconsistent with the findings that under the plan there would be "occasional spills to provide reserve storage capacity for the purpose of flood control" (Fdg. 32, R. 90), and that "Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, *but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control*" (Fdg. 35, R. 94). [Italics supplied.] Since the findings control contradictory statements in the opinion (*United States* v. *Shoshone Tribe*, 304 U. S. 111, 115), this itself demonstrates that, as Congress directed, the Friant Dam will be operated for "flood control."

The fact that for flood control purposes water will be released into the river to give storage space for flood waters necessarily means that such released waters will not be diverted for use on lands

supplied by Friant Dam. Hence, to that extent, the dam is less useful for irrigation purposes than it would be if the maximum amount of water were stored without regard to the effects of floods. Thus, operation of the dam for flood control is at the expense of possible irrigation uses, not solely for irrigation as the court below declared. And the prevention of floods, is obviously an aid to commerce. See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, in which this Court noted that among the costs of Mississippi floods were the "interruption of navigation, injury of port facilities, the creation of sand bars in the channels, interruption or stoppage of interstate transportation by rail, truck and motorcar" (p. 520), and that "it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself" (p. 525). As this Court stated in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.

In 1932, the Division Engineer pointed out that the San Joaquin "has been subject to destructive floods in the lower stretches." H. Doc. No. 191, 73d Cong., 2d sess., p. 16.[1] And, because of the contribution of Friant Dam to flood control, the district engineer and the Board of Engineers for Rivers and Harbors in 1940 stated that part of the cost of construction of Friant Dam might be charged to flood control. H. Com. on Flood Control Doc. No. 2, 78th Cong., 2d sess. The report in 1940 pointed out that in addition to other damage, the floods had caused damage to highways and interrupted the service of railroads and telephones, which are, of course, the primary means of interstate commerce. And the Secretary of the Interior has recommended that a portion of the cost of Friant Dam be allocated to flood control on the basis of an annual benefit of $291,500 from use for this purpose. H. Doc. No. 14[illegible], 80th Cong., 1st sess., pp. 29, 35. Moreover, "the fact that ends other than flood control will also be served, or that flood control may be

[1] The "Friant Reservoir" referred to in H. Doc. No. 791, 71st Cong., 3d sess., from which excerpts are quoted by respondents (Br. in Opp. pp. 5–6) is not the present Friant Dam at all. That report related to an entirely different type of project which it was proposed should be constructed for purposes of power development and irrigation at the Friant site. H. Doc. No. 791, p. 10. The Friant Dam in fact constructed is much larger than that proposed in the report and is not designed or used for power production, but for irrigation and flood control.

relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress." *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534; *Arizona* v. *California*, 283 U. S. 423, 456.

The findings here state specifically that there is no evidence one way or the other as to the effect of the Friant Dam upon the navigability of the lower portions of the river or upon such matters as the deposit of silt or the alteration of currents downstream, or as to the effect of floods upon interstate railways and highway traffic (Fdg. 49, R. 103–4; St. Fdg. 39, R. 185). In the absence of evidence the court below should not have assumed the non-existence of facts which would support the congressional declaration, particularly when the beneficial effects upon commerce of flood control projects on the upper reaches of a river are commonly known. Respondents did not prove that the Friant Dam, concededly designed both for flood control and irrigation purposes, was not an aid to commerce by establishing that it dried up portions of the river far upstream. And the burden of proof was clearly upon respondents, particularly when they were seeking to overturn a congressional declaration.

Respondents assert (Br. in Opp. p. 4) that in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81 (1927), certiorari dismissed for want of federal question, 275 U. S. 486, and *United States* v. *Central Stockholders' Corporation*, 52 F. 2d 322 (C. A. 9), it was held that storage on

the San Joaquin River was not in aid of navigation. These decisions did not, of course relate to the Central Valley Project or to the Friant Dam, and, in fact, they were expressly based on the view that the authority of the federal government over navigable streams was not involved. See 52 F. 2d at pp. 332–333, 339.

B. OWNERS OF LAND RIPARIAN TO A NAVIGABLE RIVER DO NOT OWN THE FLOWING WATERS AS AGAINST THE UNITED STATES

Respondents here do not complain that a Government project is flooding their lands. On the contrary, they are asserting that they have property rights in the flow of the stream, particularly flood waters. While the court made no finding describing the property interest it held to have been taken, the opinion stated (R. 133) "there was left in times of high water sufficient additional water to overflow the lands of the plaintiffs or, by seepage, to raise the water level underneath their lands. The result was that by overflows and by seepage the lands of the plaintiffs were moistened and enriched and made more productive. The erection of the Friant Dam took these rights from plaintiffs." Thus, the holding of the court below is that respondents have a property right to use the flow, and a similar property right in the flood stages, of a navigable stream.

Respondents concede that the rights they claim are subordinate to other riparian rights as well

as to appropriative and prescriptive rights. Such prior rights took all the water of the river for substantial periods of the year and for all of the year in some years. The result is that, as the court found, respondents benefit only from a limited amount of flood waters in the spring during the period of heavy flooding (Fdg. 29, R. 88; Fdgs. 56, 62, 85, R. 110, 113, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190). One of the principal causes of the decrease in navigation on the river has been the increasing amount of diversion of water from the San Joaquin River for the irrigation of farm lands. See H. Doc. No. 395, 73d Cong. 2d sess. And, of course, the floods cause damage of themselves. See p. 37, *supra*. Respondents claim a right to use all of the water remaining in the river after prior rights have been satisfied (R. 2–3, 19–20, 46–47, 150–151, 155–156; 158–159). The consequence is that respondents' claim to waters means that they insist on a property right to impair the navigability of the river and to prevent the control of floods therein. We submit that no such property right exists.

This Court has held that there are no private property rights in the waters of a navigable river of the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, stated: "The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use.

The flow of a navigable stream is in no sense private property; 'that running water in a great navigable stream is capable of private ownership is inconceivable'. [Quoted from *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69.] Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion." More recently, this principle was applied in *United States* v. *Commodore Park*, 324 U. S. 386, and *United States* v. *Willow River Co.*, 324 U. S. 499. In holding, in the *Commodore Park* case, that no compensation was owing for the destruction of access of the riparian owner to navigable waters, this Court said (pp. 390–391):

> Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream. Respondent's property was always subject to a dominant servitude; it did not have a vested right to have this navigable stream remain fixed and unaltered simply because of the consequent reflected additional market value to adjacent lands. Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's "absolute" power, in the interests of commerce; to make necessary changes in a stream. In short, as against the de-

> mands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as "fishing and boating and the like," for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold.

And in the *Willow River* case the principles were summarized as follows (p. 510):

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.
>
> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property.

Thus, a person who owns land riparian to a navigable stream does not have a property right in the waters and hence has no right to complain when the flow thereof is changed by the United States. This is so whether the land is benefited because in its natural state the fall of the stream creates water power (*Chandler-Dunbar Co., Appalachian Power Co., Willow River Co.* cases, *supra*), or because the stream provides access to the riparian lands (*Commodore Park* case, *supra; Gibson* v. *United States,* 166 U. S. 269).

The existence of a property right in the waters of a navigable stream is not dependent upon whether the United States is changing the flow of the river in aid of navigation or for some other purpose. Such was the holding of the *Appalachian* case. There the company contended that the recapture clause of the license to be issued under the Federal Power Act was unconnected with navigation and would constitute a taking of property without payment of just compensation. The company had as complete right to use the waters of the river as could be obtained under state law. This Court's opinion recognized that (311 U. S., at 424) "It is quite true that the criticised provisions summarized above are not essential to or even concerned with navigation as such." The Court nevertheless held that the Company would not be entitled to compensation for its water power rights because it had "no private property in the flow of the stream", saying (311 U. S., at 427):

> The respondent urges that as riparian owner with state approval of its plans, it is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra*, that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power.

So in the instant case, respondents do not have a vested right to use the waters of the river simply because their lands are benefited thereby. And certainly, there is no property right to have this navigable stream continue to overflow during the spring flood season. Such a "right" to probably the most harmful use of a stream from the standpoint of the public as a whole would be entitled to even less protection than the "rights" involved in the cases cited.

No distinction can be made based upon the view that "water rights" in western states are involved; that is, rights to use the waters for agricultural production by means of irrigation

systems, or, as here, simply by flooding of the lands. The principle is the same whether the economic advantage arises from water power development, from promotion of agriculture by furnishing access to markets, or from the furnishing of moisture to adjoining land. And the principle is the same whether riparian rights in the eastern states are involved or rights in western states—whether under the doctrine of appropriation or, as here, under the doctrine of riparian rights.

The absence of any distinction was made clear in *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690. One aspect of the federal control over navigable streams is the fact that obstructions to commerce may be prohibited. This power was exercised by Congress in the River and Harbor Act of 1890, 26 Stat. 426, 454, prohibiting obstructions to the navigable capacity of waters of the United States.[6] This Court in the *Rio Grande* case held that diversion of waters for irrigation purposes might be enjoined under that Act. The opinion summarized the change made in some western states from the doctrine of riparian rights to the appropriation doctrine, pointed to certain acts of Congress, and stated (p. 706):

[6] A similar but broader prohibition was contained in the River and Harbor Act of 1899, 30 Stat. 1121, 1151, 33 U. S. C. 403.

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests

> of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.

The Court concluded that the Act prohibiting obstructions to navigable capacity applied to the Rio Grande. Thus, this Court long ago recognized that persons in the West desiring to use water for irrigation have no greater rights in navigable streams of the West than those who desire to use the navigable waters for various other purposes where water is more plentiful. In *California Oregon Power Co.* v. *Cement Co.*, 295 U. S. 142, this Court, in discussing the provision of the Desert Land Act of March 3, 1877, 19 Stat. 377, relating to the privilege of acquiring rights under state law to use waters flowing through the public domain, carefully limited the conclusion there reached to non-navigable streams (pp. 156, 159, 162, 163).

It is established that respondents had no property right to use the waters of the river for the development of power. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Continental Land Co.* v. *United States*, 88 F. 2d 104 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*,

135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747. No reason can be given why they have greater rights to use the waters for irrigation purposes.

II

RESPONDENTS HAD NO PROPERTY RIGHTS TO UNCONTROLLED FLOODING OF THEIR LANDS UNDER CALIFORNIA LAW

In Point I we have argued that respondents are not entitled to recover because they have no right under federal law in the flow of a navigable stream. In this Point we shall show that respondents have no property rights under California law to the uncontrolled flooding of their lands. Their claims would, therefore, have no merit even if the Court should not accept the argument advanced in Point I.

As we have shown, *supra*, pp. 15–16, respondents' recovery is based solely on the benefits they derive from the peak of the flood waters of the river. Prior to 1926, it was not clear whether a riparian landowner in California could complain of the detriment resulting from reduction of floods. In that year the Supreme Court of California held in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, certiorari dismissed, 275 U. S. 486, that the owners of riparian lands were entitled to have streams flow in their natural state, including annually recurring overflow, and that one who reduced the flood levels so that they no longer

spread over riparian lands became liable to the owner of those lands. However, in the following year an amendment to the California Constitution was proposed, the purpose being "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea." *Gin S. Chow* v. *City of Santa Barbara,* 217 Cal. 673, 700. The amendment, adopted in 1928, declared the purpose of preventing "the waste or unreasonable use or unreasonable method of use of water," and provided that the right to water shall be limited "to such water as shall be reasonably required for the beneficial use to be served", and that "such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; * * *". Cal. Const., Art. XIV, sec. 3, quoted in Fdg. 48, R. 102–3.

The court below found as a fact that the controlled use of the water for cropland was a more reasonable and beneficial use than the flooding of uncontrolled grassland, whereby some of the water is absorbed and the remainder flows on (Fdg. 48, R. 103). The finding states:

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood water heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

The court below held, however, that the constitutional amendment did not prevent respondents' recovery, stating (R. 140):

> It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use.

This construction of the California law largely prevents it from achieving its objective. It is obvious that there is no physical process by which respondents could have been assured that the peak of spring floods would moisten their lands and at the same time the waste of such waters prevented. The court found (Fdg. 31, R. 90), "Because of the time required for grassland to utilize 3 acre-feet of water per acre, and because of the relatively short time during which there is a surplus of water above the requirements of appropriative and prescriptive rights, and because of the topographical situation of the lands, controlled diversion is not feasible." It is thus obvious that the flood waters are largely wasted. It is

clear that such waste in order to spread the smaller part of the flow over respondents' lands is not either a "reasonable method of use" or a "reasonable method of diversion."

In *Peabody* v. *City of Vallejo,* 2 Cal. 2d 351, the plaintiffs Peabody and others claimed benefit from storm waters overflowing their lands and depositing silt thereon, washing salt out of the lands and saturating the lands. The trial court found that these waters were being put to beneficial use by the plaintiffs, and enjoined the defendant from storing any waters in the stream. The Supreme Court of California reversed because of the effects of the constitutional amendment. After discussing the amendment, the Court held (p. 369):

> The asserted right of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, cannot be supported. So far as we are advised, this asserted right does not inhere in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters. This asserted right involves an unreasonable use or an unreasonable method of use or an

unreasonable method of diversion of water as contemplated by the Constitution. This conclusion applies to much of the lands owned by the plaintiff Peabody.

The same conclusion applies also to the asserted right of other plaintiffs to have the flood and freshet waters which leave the natural channel of the stream, overflow their lands and never return to the channel. (See *Montecito Valley Water Co.* v. *Santa Barbara*, 144 Cal. 578, 588 [77 P. 1113].)

There was also involved the asserted right to the benefit of the full flow of the stream to maintain the underground and percolating water supply. The court concluded that no injunction against impounding of waters by the defendant should be issued, and "That if, as to any plaintiff, no substantial damages be proved, but a paramount or preferential right be shown, he is entitled to a judgment declaring such right and an injunction against the assertion of an adverse right based on user or lapse of time, or to compensation for the extinguishment of the paramount right, if such course be preferred; that if substantial damages result to the plaintiffs or any of them by reason of the continuance of the defendant's enterprise, taking into consideration the tests to be applied in the conservation and reasonable use of water now required by the law, such plaintiffs are entitled to the ascertainment of such damages and to an injunction in aid of securing timely payment thereof." 2 Cal. 2d at

383. Thus the holding was that damages should not be determined simply on the basis of the value of the plaintiffs' property before and after the defendant's impounding of water, but that the tests of reasonable use set forth in the amendment should be considered in determining such damages, and that they could not be awarded for the benefit from overflow and resulting silt, etc., because that would involve unreasonable use, or an unreasonable method of use, or an unreasonable method of diversion.

In the instant case, the court below held that respondents "had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use." But the *Peabody* case held that such use of the full flood flow of the stream was unreasonable and that damages could not be awarded for unreasonable uses. The decision below is, therefore, in direct conflict with the *Peabody* case. The Court of Claims applied the rule of the *Herminghaus* case which the constitutional amendment was designed to abrogate. None of the decisions cited by the Court below (R. 140) limit the holding of the *Peabody* case. *City of Lodi* v. *East Bay Municipal Utility Dist.*, 7 Cal. 2d 316, and *Hillside Water Co.* v. *City of Los Angeles*, 10 Cal. 2d 677, both related to interference with use of underground water supplies which were in one case for the city's water system (the *Lodi* case) and in

the other as a supporting supply to surface irrigation (the *Hillside* case), uses and methods of use which in both instances were not held to be unreasonable. In the *Lodi* case a physical solution was directed whereby the city's supply could be protected without unreasonable use or unreasonable methods of use. In the *Hillside* case, no question of unreasonable use or unreasonable method of use was presented.

Nor was the *Peabody* case limited by the decisions in *City of Los Angeles* v. *Aitken,* 10 Cal. App. 2d 460, and *Los Angeles County Flood Control Dist.* v. *Abbot,* 24 Cal. App. 2d 728.[9] The *Aitken* case simply held that the use by the owners of property abutting on a lake as resorts because of its picturesque location and its availability for boating and hunting was a reasonable beneficial use. And the *Abbot* case reached a similar conclusion as to commercial use of sand and gravel deposited by the flow of the stream during the rainy season. No question arose as to whether an unreasonable method of use was involved.

The Court of Claims found (R. 88) "As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation." "Grasslands in the vicinity and of the kind here involved can

[9] The *Peabody* case was likewise not limited by the three additional cases cited in the Brief in Opposition (p. 21).

utilize approximately 3 acre-feet per acre per year with maximum benefit.' This would on any theory constitute the limit of respondents' right to water. However, under the constitutional amendment they are entitled to water for beneficial use only if it can be applied by reasonable methods of use and reasonable methods of diversion. But there is no practicable means of using that quantity of water on the lands in the absence of controlled diversion, and controlled diversion is not feasible (Fdg. 31, R. 90). Since the water which could be beneficial cannot be used by reasonable methods of use, there is no right to the water.

III

RESPONDENTS GERLACH LIVE STOCK COMPANY, POTTER AND ERRECA WERE BARRED FROM RECOVERY BY THE RESERVATIONS IN THE DEEDS UNDER WHICH THEY HELD TITLE

These three respondents acquired their lands from Miller & Lux under deeds by which certain rights were reserved. The United States has succeeded to the rights reserved. While holding in one case not now before this Court (*Martin Erreca, et al. v. United States,* certiorari denied, No. 238, this Term) that the reservation in the deed prevented recovery (R. 135–137), the court below held that the reservations in the deeds of the three respondents mentioned above did not prevent their recovery (R. 134–135, 137–138). This we believe was error.

The deeds of Gerlach Live Stock Company and Martin Erreca contained the same provision. It was provided that the riparian rights of the land conveyed "shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee" (R. 137; Fdg. 59, R. 112, Fdg. 79, R. 126). The court below made no finding as to the cause of damage to respondents, but the opinion states that the reservation only included "storage" of water, did not embrace "diversion" and asserted that "What the United States has done that has caused the damage to plaintiffs' land is the *diversion* of the waters" (R. 138).

But other portions of the court's opinion,[10] as well as the findings, make it clear that it is the storage of water which will damage respondents. Since respondents' lands were benefited only by the peak of the spring floods (Fdg. 28, R. 87), it is the reduction of the height of those floods which prevents the inundation of most of respondents'

[10] In discussing the reservation in the deed in the case that was dismissed, it stated that prior to the reservation Miller & Lux had the right to divert water from the stream but did not have the right to store and impound it (R. 136). And with reference to the reservation in the J. Sheldon Potter deed discussed *infra*, it spoke of the "right to impound water at Friant Dam" (R. 135).

lands and increases the necessary pump lift of Martin Erreca's. As we have shown, Friant Dam will be operated for flood-control purposes and the dam is constructed with gates and valves permitting the release of water, referred to as "spills," so as to reserve vacant storage space for flood waters (Fdgs. 35, 41, R. 94, 98–99). The findings repeatedly refer to both the storage and diversion of water (Fdgs. 32, 35, R. 90, 94). It is clear that respondents' damage would be the same whether the waters from the peaks of the floods were diverted or simply stored and later released.[11] Since these respondents had no right to complain of storage of flood waters because of the reservations in their deeds, and since it was such storage that deprived them of the benefits they enjoyed, regardless of whether such flood waters were later released into the river or diverted elsewhere, the matter is *damnum absque injuria.*

The reservation in the deed of respondent J. Sheldon Potter was phrased somewhat differently. It provided (1) that the conveyance was subject (1) "to all existing water rights of the Grantor and its" subsidiaries, and (2) to the right of the grantor and its subsidiaries "to sell and convey any water right already established * * * in or to the waters of the San Joaquin River * * *

[11] The situation might possibly be different as to the Martin Erreca tract where water was pumped from the river (see Fdg. 62, R. 113). However, the court made no finding as to what the effect of reduction of the peaks of floods would be.

and to store and/or change the place of use of such water * * * and such right of storage of such water * * * may be exercised by any purchaser or assignee of said water rights" (Fdg. 51, R. 106–107). The court below reasoned that since this conveyance was subject only to existing water rights of Miller & Lux and since they did not have the right to store water at Friant Dam it did not affect respondents' right to recover (R. 134–135). But respondent Potter does not claim to have acquired any right to the waters of the river except by virtue of his acquisition of the land from Miller & Lux. In the first paragraph of the exception, the existing rights were reserved. The second paragraph obviously created an additional exception which was the right to store or change the place of use of the water. Since at the time of the conveyance, Miller & Lux had the right to use the water, the second exception precisely covered the storage of such water at Friant. Otherwise, the second paragraph is meaningless so far as storage of water is concerned.

IV

THE JUDGMENTS CANNOT BE SUSTAINED ON THE THEORY THAT CONGRESS HAS ASSUMED LIABILITY TO RESPONDENTS

In the brief in opposition (pp. 14–18), the respondents contended that Congress has directed the payment of compensation to respondents. The court below did not rest its decision upon any such

ground. Respondents may, of course, urge contentions not passed upon below which support the judgments. But we think it clear that Congress has not directed that compensation be paid.

A. RESPONDENTS WERE NOT GRANTED A RIGHT OF RECOVERY IN LEGISLATION RELATING TO THE CENTRAL VALLEY PROJECT

Respondents rely upon the fact that in the plan of the project described in the letter of the Secretary of the Interior the estimated cost thereof included an amount for "rights of way, water rights and general expense," and it was stated that "part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands" (R. 93; Br. in Op. 6). The Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, authorized the project in accordance with the plans set forth in Rivers and Harbors Com. Doc. No. 35, 73d Cong., which recommended a federal contribution of $12,000,000 to the cost of Kennett (Shasta) Dam. The Act of August 26, 1937, 50 Stat. 844, 850, provided that this $12,000,000 should, when appropriated, be available for expenditure by the Secretary of the Interior instead of the Secretary of War, and the entire Central Valley Project was authorized; it authorized the Secretary of the Interior to acquire by "eminent domain, or otherwise, all lands, rights-of-way, water rights and other property necessary for said purposes". (See p. 5, *supra*.) Various sums have been ap-

propriated annually for construction of the project, usually as a lump sum. For example, the Act of August 9, 1937, 50 Stat. 564, 597, contained the appropriation "Central Valley project, California, $12,500,000 together with the unexpended balance of the appropriation for this project contained in the First Deficiency Act, fiscal year 1936." The only reference to water rights in the various appropriation acts, which are set out in the Appendix, *infra,* pp. 89–96, is in the Act of July 12, 1943, 57 Stat. 451, 476, which included "examinations, surveys and water rights, $200,000."

Respondents' contention that Congress ordered payment for water rights rests upon these general statements of the Secretary of the Interior, the statutes empowering him to pay for water rights, the availability of funds for such purposes, and the fact that payments have been made to Miller & Lux, and others.[12] These all show that the Secretary of

[12] The reasons why the Government paid some riparian owners but not these respondents are indicated by the record. As to each of respondents Gerlach, Potter and Erreca, there was a question as to whether, under the reservations in the deeds whereby those respondents acquired their properties from Miller & Lux (see Point III, *supra,* p. 56), the sums applicable to their properties were payable to them or reserved to Miller & Lux (R. 133–134). Hence the agreement with Miller & Lux provided that this portion of the sum payable to the latter be placed in escrow, and used to reimburse the Government for any judgments which might be recovered by the three respondents. (R. 134.) As to the three Stevinson respondents, their petitions below aver that

the Interior *was authorized* to pay for water rights. But none of the statutes did more than authorize payment for water rights. In none did Congress assume liability beyond that imposed by the Constitutional requirements, and in none did Congress *direct* that persons having "rights" such as respondents be paid.

Respondents' argument ignores the distinction between an authorization to make payments and a congressional directive that they shall be made. In *Mitchell* v. *United States*, 267 U. S. 341, land was taken under authority of an Act which appropriated $7,000,000 for:

> increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and *losses to persons, firms, and corporations, resulting from the procurement of the land* for this purpose. [Italics supplied.]

This Court denied a claim for indirect damages suffered as a result of the loss of a business. The Court noted that by the above provision (267 U. S. at 345–346):

> Congress doubtless *authorized* the Secretary of War to take into consideration

they had been unable to reach an agreement with the Government as to the amount of compensation to be paid them. (R. 152, 156, 159.) In their petitions these respondents claimed $75,000, $9,000 and $780.00 respectively (R. 154, 157, 159); they were awarded $25,173, $1,665 and $234.00 (R. 192).

> losses due to the destruction of the business, where he purchased land upon agreement with the owners. [Italics supplied.]

But the Court held that:

> But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. * * * Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.*, 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose" does not confer such a right.

Here, too, Congress may have authorized payment for water rights. But it did not assume any responsibility, or create any right not heretofore existing. As in the *Mitchell* case, respondents here must show "some statutory right conferred". But under the Acts relied upon by respondents, Congress did no more than simply authorize the Secretary to make payments. The *Mitchell* case establishes that in such circumstances there is no right to recover.

This would seem clearly correct. A general phrase in an appropriation act permitting payment for certain "rights" does not confer a right for which payment may be compelled. The au-

thorization empowered the governmental agency to contract to pay for water rights for which it would not otherwise have been liable and could not lawfully have paid. But it did not create any new rights enforceable at law against the Government.

There is ample reason for authorizing a governmental officer in his discretion to determine when it would be desirable in the public interest to make appropriate payments without creating a legal liability. It may be desirable in the interests of expediting the project and for the purpose of reconciling the various interests involved in such an undertaking that the governmental officer have authority to reach voluntary agreements settling claims asserted. It does not follow from the grant of such authority that Congress has waived the federal immunity and has undertaken a legal liability to pay such claims. It cannot be said that there is a clear assumption of liability. As this Court said in *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196: "A liability in any case is not to be imposed upon a government without clear words." See also *United States* v. *Zazove*, 334 U. S. 602, 617. Another aspect of the same principle is the fact that statutes waiving sovereign immunity are strictly construed and enlargement thereof by implication is not permissible, *United States* v. *Goltra*, 312 U. S. 203, 210–

211; *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 659.

Respondents' construction leads to the conclusion that, as to this particular project, Congress adopted a policy contrary to that prevailing with reference to any other river improvement project in the United States. When changes in policy are made, they are clearly and unmistakably expressed, as illustrated by the Act of December 22, 1944, 58 Stat. 887, discussed *infra*, p. 71. Certainly the statutes upon which respondents rely do not plainly support an assumption that Congress intended thereby to adopt such a radical departure from previous policy as that for which respondents contend.

But even if it be assumed that the acts relied upon constituted a direction to the Secretary to make compensation to respondents, the statutes do not show that Congress intended to assume an obligation enforceable in a suit against the United States in which the amount to be paid would be judicially determined. At most, even so construed, they empower the Secretary to exercise his discretion, for which judicial opinion cannot be substituted, as to payment and amount. The only remedy available if he wrongfully refuses to consider a claim would be by mandamus or its equivalent, not by an independent action for the amount claimed.

B. RESPONDENTS WERE NOT GRANTED A RIGHT OF RECOVERY UNDER THE RECLAMATION ACT

The 1937 Act (*supra*, p. 5) transferred the Central Valley project from the Secretary of War to the Secretary of the Interior. The third proviso then provided that the project would be covered by the reclamation law.[13] Respondents accordingly claim that the Reclamation Act of 1902 (32 Stat. 388) is applicable, and that sections 7 and 8 (43 U. S. C. 372, 383, 421) give them a right to recover.

Section 8 of the Act (43 U. S. C. 372, 383)[14] provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right

[13] "*Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes; * * *."

[14] Section 7 of the Act (43 U. S. C. 421) simply authorizes the acquisition by condemnation of "any rights or property."

> acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

This section did not constitute a grant of any rights. Instead it obviously was intended to avoid any possibility that the Reclamation Act would be construed as impliedly repealing the Desert Land Act, which made possible the acquisition of water rights in non-navigable streams under procedures established by state law. The second clause merely instructs the Secretary of the Interior to proceed in conformity with local law, and certainly such direction cannot constitute a grant of rights to anyone. The third clause, by providing that rights of the Federal Government in interstate streams shall not be affected, obviously cannot constitute a surrender of federal rights.[15] And the final clause, the proviso, establishes a federal rule regardless of state law relating to use of the water within a reclamation project after it has

[15] As to the reasons for the provision, see *Wyoming* v. *Colorado*, 259 U. S. 419, 463.

been established. Thus, there is nothing in any provision of the section which grants to individuals greater rights than they had prior to its enactment. And the House Reports (No. 794, 57th Cong., 1st sess., p. 6) specifically states that "Section 8 recognizes State control over waters of *non-navigable* streams such as are used in irrigation." [Italics supplied.]

Since, as we have shown *supra*, p. 39, private rights in the flow of navigable streams do not exist at least as against the United States, the first clause does not require their recognition by the Secretary. Since the waters of the river as well as the land were part of the public domain, the only way any water rights could be acquired and become vested under state law within the meaning of section 8 would be under the authority of the Acts of July 26, 1866, 14 Stat. 251, the Act of July 9, 1870, 16 Stat. 217, and the Desert Land Act of March 3, 1877, 19 Stat. 377. But in *California Oregon Power Co.* v. *Cement Co.*, 295 U. S. 142, it was repeatedly emphasized that the above statutes applied only to non-navigable waters. Since section 8 of the Reclamation Act requires the recognition of only those rights which are vested under state law and since no such rights could vest in navigable streams under state law, it follows that section 8 does not require the recognition of rights claimed by respondents.[16]

[16] Of course, the Secretary would be bound to recognize any rights which existed under federal law but, as we have shown *supra*, p. 39, the respondents have no such rights.

This construction is borne out by the administrative construction almost contemporaneous with the passage of the Act. An opinion of the Assistant Attorney General for the Interior Department, approved by the Secretary, was that the Act did not authorize claims to waters in navigable streams. He stated, *inter alia* (33 L. D. 391, 405; 1905):

> One element which the California Development Company undoubtedly considers of great importance in estimating the value of the property to be sold by it, is the claimed right to divert 10,000 cubic feet of water from the Colorado river. If the recognition of its claim as a valid right is involved in the approval of this transaction by the Secretary of the Interior, such approval should be withheld. *The Congress has control over navigable streams and the waters thereof. No claim based upon appropriation of such waters for irrigation made without the sanction of Congress should be recognized by this Department as valid.* Claims to the water of such a stream asserted under the law of a State must be adjudicated in some other forum. This Department not having jurisdiction to decree the validity of such a claim as that presented here should not do that which would necessarily involve the hypothesis of its validity. It seems that claims already made under state and territorial laws cover several times over all the waters of the river. If these claims can be sustained and enforced the navigation of the river would

> be utterly destroyed and all plans now under consideration by the reclamation service, which involve the use of water from this stream, would necessarily have to be abandoned. The Department of Justice is of opinion, as shown by the report of April 8, 1904, on H. R. 13627, that such claims cannot be sustained. [Italics supplied.]

See S. J. Res. 71, 33 Stat. 591; see also H. J. Res. 147, 58th Cong. 2d sess.; H. Rept. 2578, 58th Cong. 2d sess. Thus, almost contemporaneously with passage of the Reclamation Act, the administrative authorities recognized that, as the language of the Act shows, it was not intended to create property rights in the flowing waters of navigable streams nor to waive any rights of the Federal Government in that regard. So far as we have been able to ascertain, the question has not arisen in any administrative or judicial proceeding in the 40 years since that time. This in itself warrants the inference that the administrative interpretation of the Reclamation Act has been accepted.

As this Court has recognized, the Reclamation Act was enacted not in exercise of the federal power over navigable streams but as an exercise of the power to improve property of the United States, particularly the public domain. *United States* v. *Arizona*, 295 U. S. 174, 184. The title[17] and entire text of the 1902 Act show that it was

[17] "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories for the construction of irrigation works for the reclamation of arid lands." 32 Stat. 388.

concerned with the irrigation of arid public lands of the United States by the Department of the Interior. At that time projects on navigable waters normally were undertaken by the War Department. It is clear, both from the face of the Act and from its setting, that Congress was not dealing with water rights in navigable streams, but with non-navigable waters in the public domain. *Cf. United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, discussed *supra*, pp. 45–47. The rights which section 8 was designed to protect were thus not rights in the navigable waters of the United States.

C. THE FLOOD CONTROL ACT OF 1944

Respondents also refer (Br. in Opp. p. 15) to section 1 (b) of the Flood Control Act of December 22, 1944, 58 Stat. 887,[18] saying that Congress expressly provided therein that water rights of landowners in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act. But the Act does not create such superior rights. It simply states a general policy to govern future

[18] "(b) The use for navigation, in connection with the operation and maintenance for such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

planning for projects in the western states. It says nothing as to the rights of riparian owners, and creates no new rights to compensation. In any view of the Act, it certainly does not purport to vest retroactively in respondents a property right which the court below held was taken three years earlier.

V

THE COURT OF CLAIMS FAILED TO DESCRIBE IN ITS FINDINGS THE PROPERTY TAKEN BY THE UNITED STATES

The opinion below referred to the rights of plaintiffs to the waters of the river (R. 132) and stated elsewhere that the erection of the dam "took these rights from plaintiffs" (R. 133). However, there is no finding which purports in any manner to describe what property was taken or what property interest would be acquired by the Government upon payment of judgments in favor of respondents. Respondents say that their petitions alleged their "riparian rights" and assert that the court found that that was what was taken (Br. in Opp. 20). The finding referred to (Fdg. 32, R. 90) is simply a description of the plan for the project. Neither in this finding nor in any other is there an explicit finding that respondents' "riparian rights" were taken.

More important, there is no attempt to define their riparian rights. The findings recognize that respondent's rights to use the water are inferior to other rights (e. g. Fdg. 12, R. 76). As

the findings state (Fdg. 30, R. 88) "The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners." In view of the nature of water rights, a finding that respondents' "water rights" were taken would not be nearly as definite as the "easement" in *United States* v. *Causby*, 328 U. S. 256, 267, which was held to be an insufficient description of the property taken. Certainly, the absence of the required finding cannot be supplied by judicial notice as respondents seem to suggest (Br. in Opp. p. 22).

Moreover, it is clear from the findings that all rights of respondents to use water of the San Joaquin River were not taken. All water will not be removed from the river, and upstream from respondents' lands there are tributaries which contribute water to the flow unaffected by Friant Dam (Fdg. 47, R. 102). While the finding is that the flow of the river would not flood respondents' lands (Fdg. 47, R. 102), the benefit from floods was not the only right claimed by them. They also claimed rights to use the water for domestic use and for watering livestock (Fdg. 28, R. 88). Obviously respondents have not been deprived of all rights to waters in the river. It is, therefore, important that the rights which have been taken and paid for in this proceeding be precisely described so as to avoid any dispute in the future.

VI

THERE WAS NO TAKING FROM RESPONDENTS ON OR PRIOR TO OCTOBER 20, 1941, SUCH AS TO ENTITLE RESPONDENTS TO INTEREST FROM THAT DATE

Respondents contended and the court below held that respondents' properties were taken on October 20, 1941. The court awarded interest from that date which amounts to some $27,000 at the present time (R. 129, 191). It is submitted that, assuming that there will be a taking of property of respondents as a result of operation of the Friant Dam, the court erred in holding that such taking had occurred by October 20, 1941, so that as to entitle respondents to interest from that date.[19]

There is no dispute concerning the facts as to this matter. Construction of the dam was commenced in 1939, and up to March 1941 the water of the river was carried around the dam site in a flume slightly above the normal low-water surface of the river (Fdg. 42, R. 99).

As the work progressed the flow was diverted through temporary openings which were some 10 feet above the normal low-water surface of the river (elevation 305.6 feet (R. 99)). In 1941 the temporary openings were closed, the last one about October 20, 1941, and water was impounded to elevation 375.42 feet when it commenced to spill through permanent river outlets

[19] Under a theory of statutory assumption of liability interest would not be allowable. *United States* v. *Hotel Co.*, 329 U. S. 585.

(Fdgs. 43, 44, R. 100). These outlets were designed to be controlled by needle valves, but the valves were not installed and used for impounding water until February 1944 (Fdg. 45, R. 101). The Madera Canal, through which part of the water will be diverted, was completed in 1944 (Fdg. 46, R. 101), and the Friant-Kern Canal, the other diversion canal, was not completed at the time of trial in 1946 (Fdg. 46, R. 102). Also drum gates had not then been installed "and for that reason the reservoir has not yet filled to its designed capacity" (Fdg. 46, R. 102). In each case, the court found that had the impounding between October 21 and November 11, 1941, not occurred, "the flow still would not have been sufficient to flood the" respondents' lands, and that "Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941" (Fdgs. 56, 75, 85, R. 110, 124, 127; St. Fdgs. 41, 45, 48, R. 188, 189, 190).

Thus, as the opinion below recognized (R. 141), at the time of trial respondents were "still getting all the water they ever got because defendant's project has not yet advanced to the stage where their water has been cut off." Moreover, as the findings show, it was physically impossible in October 1941 and for many years thereafter to deprive respondents of any rights.

The prospect that respondents will be deprived of water sometime in the future cannot constitute such a taking of their rights as to entitle them

to interest. Such was the view of this Court in *Danforth* v. *United States*, 308 U. S. 271. The petitioner's land there was located in a proposed floodway located between a river-bank levee and a set-back levee. The floodway would be used through means of a fuse-plug, which is a portion of the river-bank levee lowered some five feet so as to feed floodwaters in the floodway. This Court held that there was no taking either by enactment of the legislation authorizing the project or by commencement or completion of the set-back levee, and hence that no interest was payable. The opinion stated (p. 286):

> The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The river bank levee at the fuse-plug has not been lowered from is previous height. Consequently the land is as well protected from destructive floods as formerly.

The instant case presents the converse physical situation, but the principle is the same. Respondents' lands have not been deprived of any of the benefits of floods which they formerly enjoyed. Respondents argue (Br. in Opp. pp. 19–20) that compensation should depend upon the use which the condemnor was entitled to make rather than the actual use. But that argument (regardless of

its validity—see *Karlson* v. *United States*, 82 F. 2d 330 (C. A. 8)), ignores the physical fact that it was impossible to deprive respondents' lands of floodwaters in October 1941 because valves were not installed and were not available.

The court below did not refer to the *Danforth* case, which deals with the problem of interest in circumstances very similar to those at bar, but cited other decisions (R. 142–144) which clearly do not support its conclusion. In *United States* v. *Sponenbarger*, 308 U. S. 256, this Court held that adoption by Congress of the Mississippi Flood Control Act of 1928 was not a taking. The opinion in the *Danforth* case, decided the same day, shows that the *Sponenbarger* decision did not, as the court below seemed to think (R. 143–144), rest on the fact that the plan contemplated in the *Sponenbarger* case was later abandoned. These decisions likewise demonstrate that *Hurley* v. *Kincaid*, 285 U. S. 95, did not hold that adoption of a plan by Congress was a taking as soon as the Government begins to carry out the project. Rather, that decision was simply that, even if it were assumed that there was a taking, there was an adequate remedy at law and hence equitable relief should not be granted.

Nor do the decisions in *Peabody* v. *United States*, 231 U. S. 530, *Portsmouth Co.* v. *United States*, 250 U. S. 1, and *Portsmouth Co.* v. *United States*, 260 U. S. 327, support the decision below. In the first two cases it was held that no taking

had occurred. In the third case it was held that a taking had been sufficiently alleged, the petition stating that guns had been set up with the intention of firing them over the claimants' land. Thus, there was physical ability to perform the harmful act coupled with intent to do so. It has never heretofore been held that a taking had occurred prior to the time the project was sufficiently completed so as to be able to execute the plan.

In *United States* v. *Dickinson*, 331 U. S. 745, the question of when a taking had occurred so as to permit the institution of a suit was not decided (p. 749). This Court's emphasis on practical fairness in relation to the particular situation there presented—when the statute of limitations should begin to run—suggests a similar approach to the question of interest, which would bar the running of interest before any of a property owner's rights were actually invaded.[20]

The court below reasoned (R. 145) that by October 1941 the United States had brought about a decrease in the value of plaintiffs' lands because "With the imminent prospect of their being deprived of any

[20] Although the Government argued in the *Dickinson* case that the taking occurred when the dam began to impound water, in that case there was no physical impediment rendering the "taking" of the riparian owner's rights impossible until some indefinite future time, such as there is here. The reasoning of this Court's opinion, which did not accept the Government's theory, suggests that the critical date or dates for purposes of the statute of limitations may well be different from the date for the running of interest.

further rights to the flood waters of this river, they could not have sold them for their former value." But in the physical situation existing at that time, and particularly since the Friant-Kern Canal had not even been commenced (Fdg. 45, R. 101), it was obvious that the owners of such lands would enjoy the benefits of the flood waters for a considerable period after that date, and they did in fact receive those benefits up to the time of trial. The "interest" which is awarded as a part of just compensation under the Fifth Amendment represents an amount sufficient to produce the full equivalent of market value paid contemporaneously with the taking. *United States* v. *Klamath Indians,* 304 U. S. 119, 123. But, as stated in *Bauman* v. *Ross,* 167 U. S. 548, 574:

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Respondents were not deprived of use of the flood waters in October 1941. At that time they could have, at most, simply anticipated that they would lose their rights to such waters when the gates and valves were installed and the diversion canals completed. The result of the decision below is that for several years after 1941 respond-

ents continued to enjoy the benefits of the flood waters, and yet for all of those years the United States is required to pay interest as if respondents did not have them. Such a result is, we submit, "unjust to the public." Respondents have been compensated, not because of any interference actually experienced with their property rights, but merely because the project had been undertaken and partially completed. As this Court stated in the *Danforth* case, *supra* (308 U. S. at p. 285):

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

CONCLUSION

For the foregoing reasons the judgments of the court below should be reversed with directions to dismiss the petitions.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ROGER P. MARQUIS,
RALPH S. BOYL,
ROBERT L. STERN,
Attorneys.

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APPENDIX

The Reclamation Act of June 17, 1902, 32 Stat. 388, provides:

> SEC. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.
>
> SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurte-

nant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

* * * * *

The Rivers and Harbors Act of August 30, 1935, 49 Stat. 1028, 1038, provided:

That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; and that hereafter Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress:

* * * * *

Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress;

* * * * *

The Act of July 30, 1941, 55 Stat. 612, provides:

That, in aid of the construction of the Central Valley project, authorized by the Acts of April 8, 1935 (49 Stat. 115), and August 26, 1937 (50 Stat. 850), there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the area embraced by the Central Valley project, in-

cluding sites of agency and school buildings and related structures, as may be designated therefor by the Secretary of the Interior from time to time, and (b) such other interests in or to any of such lands and property as may be required and as may be designated by the Secretary of the Interior from time to time for the construction of reservoirs, canals, ditches, pipe lines, highways, railroads, telegraph, telephone, and electric-transmission lines in connection with the project, or for the relocation or reconstruction of such facilities made necessary by the construction of the project.

SEC. 2. As lands or interests in lands are designated from time to time under this Act, the Secretary of the Interior shall determine the amount of money to be paid to the Indians as just and equitable compensation therefor. As to the tribal lands, the amounts so determined shall be transferred in the Treasury of the United States from the funds now or hereafter made available for the construction of the Central Valley project to the credit of the appropriate tribe pursuant to the provisions of the Act of May 17, 1926 (44 Stat. 560). The amounts due individual landowners or their heirs or devisees shall be paid from funds now or hereafter made available for the construction of said project to the superintendent of the appropriate Indian Agency or such other officer as shall be designated by the Secretary of the Interior for credit on the books of such agency to the accounts of the individuals concerned.

SEC. 3. Funds deposited to the credit of allottees, their heirs, or devisees may be used, in the discretion of the Secretary of

the Interior, for the acquisition of other lands and improvements, or the relocation of existing improvements or construction of new improvements on the lands so acquired for the allottees or heirs whose lands and improvements are acquired under the provisions of this Act. Lands so acquired shall be held in the same status as those from which the funds were derived, and shall be nontaxable until otherwise provided by Congress.

SEC. 4. As to any Indian cemetery lands required for the project, the Secretary of the Interior is authorized, in his discretion, in lieu of requiring payment therefor, to establish cemeteries on other lands that he may select and acquire for the purpose, and to remove bodies, markers, and other appurtenances to the new sites. All costs incurred in connection with any such relocation shall be paid from moneys appropriated for the project. All right, title, and interest of the Indians in the lands within any cemetery so relocated shall terminate and the grant of title under this Act take effect as of the date the Secretary of the Interior authorizes the relocation. Sites of the relocated cemeteries shall be held in trust by the United States for the appropriate tribe, or family, as the case may be, and shall be nontaxable.

SEC. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to prescribe such regulations as he may deem appropriate to carry out the provisions of this Act.

* * * * * *

The Act of December 22, 1944, 58 Stat. 887, provides:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If

such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of

his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same

provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

* * * * *

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be *utilized for irrigation purposes*, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be

predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

* * * * *

The Act of June 22, 1936, 49 Stat. 1597, 1622, appropriated funds for:

Central Valley Project; California: For continuation, $6,900,000, to remain available until June 30, 1937, of which $6,000,000 shall be available for construction of Friant Reservoir and irrigation facilities therefrom in the San Joaquin Basin and $250,000 for administrative expenses (including personal services in the District of Columbia and elsewhere), to be available for the same purposes as those specified for projects included in the Interior Department Appropriation Act for the fiscal year 1937 under the caption "Bureau of Reclamation" and to be reimbursable under the Reclamation Law; *Provided,* That not to exceed $25,000 may be expanded for personal services in the District of Columbia.

* * * * *

The Act of May 9, 1938, 52 Stat. 291, 324, appropriated funds for:

Central Valley project, California, $9,000,000, together with the unexpended balance of the appropriation for this project contained in the Interior Department Appropriation Act, fiscal year 1938, with authority in connection with the construction of the Central Valley project, California, (1) to purchase or condemn and to improve suitable land for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmission lines or other properties the relocation of which, in the judgment of the Secretary of the Interior, will be necessitated by construction or operation and maintenance of said project, (2) in full or part payment for said properties to be relocated, to enter into contracts with the owners of said properties to be relocated whereby they undertake in whole or in part the property acquisition and work involved in relocation and, in said Secretary's discretion, to pay in advance for said work undertaken by said owners; and (3) to convey or exchange acquired rights-of-way or other lands or rights-of-way owned or held by the United States for use in connection with said project, or to grant perpetual easements therein or thereover, or to undertake improvement or construction work connected with said relocations, for the purpose of effecting completely said relocations;

* * * * * *

The Act of May 10, 1939, 53 Stat. 685, 718–719, propriated funds

For continuation of construction of the following projects and for general investigations in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the

same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation", to be immediately available, to remain available until expended, and to be reimbursable (except as to the Pine River project, Colorado, and the Colorado River project, Texas) under the reclamation law:

Central Valley project, California, $10,000,000: *Provided,* That this appropriation and the unexpended balances of appropriations heretofore made for the construction of this project shall be available until expended and shall be accounted for as one fund, entitled "Central Valley project, California";

* * * * *

Appropriations in substantially the same terms are made for the Central Valley project in the Acts of April 6, 1940, 54 Stat. 82, 87; Act of June 18, 1940, 54 Stat. 406, 438; Act of June 28, 1941, 55 Stat. 303, 336; Act of July 2, 1942, 56 Stat. 506, 536.

In the Act of July 12, 1943, 57 Stat. 451, 476, appropriation was made

> For continuation of construction of the following projects and for general investigations and administrative expenses in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation" under the heading "Administrative provisions and limitations", but without regard to the amounts

of the limitations therein set forth, to be immediately available, to remain available until expended, and to be reimbursable under the reclamation law:

* * * * *

Central Valley project, California, Shasta Dam, Reservoir, and power plant, $10,900,000; Keswick Dam and power plant, $1,474,000; Friant Dam and Reservoir, $595,000; transmission line to Shasta substation, $400,000; Friant-Kern Canal, $7,000,000; Madera Canal, $1,000,000; Contra Costa Canal, $500,000; Contra Costa laterals, $500,000; and examinations, surveys, and water rights, $200,000; in all, $22,569,000;

* * * * *

The Act of June 28, 1944, 58 Stat. 463, 490, ppropriated funds

For continuation of construction of the following projects and for general investigations and administrative expenses in not to exceed the following amounts, respectively, to be expended from the general fund of the Treasury in the same manner and for the same objects of expenditures as specified for projects included hereinbefore in this Act under the caption "Bureau of Reclamation" under the heading "Administrative provisions and limitations", but without regard to the amounts of the limitations therein set forth, to be immediately available, to remain available until expended, and to be reimbursable under the reclamation law:

* * * * *

Central Valley project, California, $960,200, and in addition thereto the unexpended

balance heretofore determined to be available for construction of transmission lines shall be allocated to other construction features of the project;

* * * * * *

The Act of July 3, 1945, 59 Stat. 318, 342, appropriated funds

For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law:

* * * * * *

Central Valley project, California, $4,500,000;

* * * * * *

The Act of December 28, 1945, 59 Stat. 632, 647–648, appropriated funds for

Construction: For additional amounts for construction of the following projects, including the objects specified under the head "Bureau of Reclamation" in the Interior Department Appropriation Act, 1946, to be expended from the general fund of the Treasury, to remain available until expended and to be reimbursable under the reclamation law:

* * * * * *

Central Valley project, California: Storage system, Shasta Dam and Reservoir, relocation of secondary roads, $100,000; road between Shasta and Keswick Dams and United Sates Highway 99, $150,000; clearing Shasta Reservoir area, $100,000; Shasta Dam, $500,000; Delta division,

Delta-Mendota canal, $7,500,000; Delta Cross channel, $349,420; Friant division, Friant Dam and Reservoir, $200,000; Friant-Kern canal, $6,000,000; Power system, Shasta power plant, $885,580; Keswick Dam, $500,000; Keswick power plant, $550,000; switchyards, $1,600,000; transmission lines, Oroville to Sacramento, two hundred and thirty kilovolt, $730,000, and Sacramento between substations, two hundred and thirty kilovolt, $50,000; in all, $19,215,000;

* * * * *

The Act of July 1, 1946, 60 Stat. 348, 367, appropriated funds

For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law:

* * * * *

Central Valley project, California: Joint facilities, including storage system, Shasta Dam and Reservoir, $1,385,365; irrigation facilities, $6,284,020; power facilities, Shasta power plant, $1,435,097, Keswick Dam, $510,570, Keswick power plant, $510,570, switchyards at Shasta and Keswick Dams, $1,500,000, transmission lines, Shasta to Oroville, two hundred and thirty kilovolt, $10,000, Oroville to Sacramento, two hundred and thirty kilovolt, $1,000,000, Contra Costa Canal extension, sixty-nine kilovolt, $50,000; in all, $12,685,622;

* * * * *

The Act of July 25, 1947, 61 Stat. 460, 475, appropriated funds

> For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law, except as provided in the Act of August 14, 1946 (Public Law 732), Seventy-ninth Congress:
>
> * * * * *
>
> Central Valley project, California: Joint facilities, $690,000; irrigation facilities, $5,622,028; power facilities, Shasta power plant, $427,800, Keswick Dam, $100,740, Keswick power plant, $218,040; transmission lines, Shasta to Delta, via Oroville and Sacramento, two hundred and thirty kilovolt, $256,680, Shasta Dam to Shasta substation, two hundred and thirty kilovolt, $1,500,000, Keswick tap line, two hundred and thirty kilovolt, $160,000, Contra Costa Canal extension, sixty-nine kilovolt, $118,000; substation, Contra Costa, $48,000; in all, $9,141,288;
>
> * * * * *

The Act of December 23, 1947, 61 Stat. 941, 944, appropriated funds for

> Construction: For additional amounts for continuation of construction of the following projects, to remain available until expended, and to be subject to such limitations and restrictions as may be applicable to appropriations for such purposes in the

Interior Department Appropriation Act, 1948, or other law, as follows:

* * * * *

Central Valley project, California: Joint facilities, $1,273,600; irrigation facilities, $8,771,600; power facilities, Shasta power plant, $700,000; Keswick Dam, $145,000; Keswick power plant, $514,800; in all, $11,405,000.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 299

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

No. 300

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

No. 301

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

No. 302

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

No. 303

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

No. 304

UNITED STATES OF AMERICA, PETITIONER

v.

3-H SECURITIES COMPANY

REPLY BRIEF FOR THE UNITED STATES

STATEMENT

Briefs have been filed by two groups of *amici curiae* which raise some points which may require discussion. A number of western states form one

group, while the other is composed of a number of plaintiffs in actions in the Court of Claims which are said to be similar to the cases before this Court. When necessary to differentiate between them, they will be designated hereinafter as "The States" or "The Claimants", respectively.

The points raised are:

1. That the Act of July 26, 1866, c. 262, 14 Stat. 251, 253, is a recognition by the United States of the rights of respondents here. (States' Br., p. 6; Claimants' Br., p. 39)

2. That Section 8 of the Reclamation Act of 1902 constitutes such a recognition. (Claimants' Br., p. 18)

3. That water rights in the navigable streams of the west are not subject to the navigation servitude which the United States has over the navigable streams of the east. (Claimants' Br., p. 36)

4. That legislation dealing with the Central Valley Project has created an obligation to pay respondents by ratification of a course of conduct followed by the Secretary of the Interior. (Claimants' Br., p. 27)

5. That the flood control features of Friant Dam produce relatively "trivial" benefits as compared to the benefits of the irrigation operations and as compared to the cost of the dam and some of its

related works and so, it is argued, the damages to respondents should be regarded as a taking for irrigation alone. (Claimants' Br., p. 46).

ARGUMENT

I

Section 9 of the Act of July 26, 1866, c. 262, 14 Stat. 251, 253, Does Not Aid Respondents

The provisions of that Act upon which the *amici curiae* rely are:

> "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

The effect of that Act was to establish the doctrine of prior appropriation of waters running through the public domain. *Atchison* v. *Peterson*, 20 Wall. 507, 513. Its purpose was to abrogate the riparian doctrine. *Ibid.* 512. It was based on the principle that "he who first connects his own labor [to divert water] with property thus situated [i.e., removed from the stream] and open to general

exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor." *Ibid.* 512.

Neither the language nor the purpose of the statute nor the principle embodied in it have any application here.

The language deals with rights founded on "priority of possession". The claim of respondents is for rights based solely on riparian location. The purpose of the statute was to abrogate the doctrine upon which such claims are founded.[1] The principle of natural justice in securing one in the fruits of his labor has no application since the claim of respondents (except in the case of Erreca) is for the loss of natural flooding and not for the loss of any benefit which their labors have created. Even in Erreca's case, he is claiming a riparian right, not an appropriative right, so a statute establishing the appropriative doctrine cannot be regarded as recognizing or confirming a claim of riparian right.

II

Section 8 of the Reclamation Act Does Not Support Respondents' Claims

The Claimants argue in their brief (p. 18) that Section 8 of the Reclamation Act should not be construed as urged in the Government's main brief

[1] The Government does not contend that the statute in question diminished respondents' rights since their titles are all based upon patents antedating the statute.

(pp. 66-71). In opposition, they urge various statements made in the congressional debates on the bill and they argue that as a matter of administrative practice "The Bureau of Reclamation has invariably recognized" water rights in navigable streams.

As pointed out in our main brief (p. 68), two reports of the House Committee on Public Lands make the same statement that Section 8 recognized state control over waters of non-navigable streams. It is true that one report dealt with the House bill, which was enacted into law, and the other dealt with a similar, though not identical provision, in a Senate bill, which did not pass. Claimants say: "The Senate Committee did not repeat the error of the House Committee. See S. Rept. No. 254, 57th Cong., 1st sess." The cited Senate report dealt with the Senate bill, which was not enacted, and is silent on the question whether Section 8 was intended to apply to private rights in navigable waters. There is no suggestion in the Senate report that it was so intended.

The parts of the debate on the bill cited by Claimants have nothing to do with the meaning of Section 8. Instead, with one exception, they are directed to the question whether the bill would authorize the Secretary of the Interior to carry out reclamation projects on navigable streams. The one exception, the statement of Mr. Sutherland, of Utah (35 Cong. Rec. 6770), does not touch

the distinction between navigable and non-navigable waterways.

In their brief, p. 25, Claimants assert that "The Bureau of Reclamation has invariably recognized" water rights in navigable streams. The statement is not documented and appears to be erroneous. Thus, in the argument for Arizona in *Arizona* v. *California,* 283 U. S. 423, 439, it was contended that "Defendant Wilbur threatens to invade the quasi-sovereign rights of Arizona by building a dam within its jurisdiction and diverting and using water from its jurisdiction in violation of its laws," and (p. 447) it was argued "The State in its sovereign capacity owns the water in the river, the bed of the river, and its banks to high water mark. This is a full proprietary ownership." Thus, it was at least contended that the Secretary of the Interior was violating both the laws and the property rights of the state in the water. The Court did not decide the validity of either contention, so the decision lends no support to either side in connection with the precise point under consideration here. It is to be noted, however, that the Secretary was there acting under a statutory authorization in terms which appear to have been copied into the statute authorizing the Central Valley Project.

III

Water Rights, Such as They Are, in the Navigable Streams of the West, Are Subject to the Same Powers of the Federal Government as Are Rights in the Eastern Streams

Claimants urge in their brief (p. 36) that respondents cannot be deprived of their claimed rights without compensation even in aid of navigation. Their argument in this connection seems to be founded on the premise that by statutes such as the Act of July 26, 1866, (discussed supra, p.), and the Desert Land Act of 1877, (19 Stat. 377), Congress has surrendered, at least in part, its powers to improve navigation in the west. The argument seems to be that the several statutes show a congressional policy to protect water rights for irrigation even as against the needs of navigation.

In 1877, the year in which the Desert Land Act was passed, Congress adopted the first project for the improvement of navigation of the San Joaquin. See Senate Committee on Rivers and Harbors Report No. 1686, 55th Cong., 3rd Sess., p. 282. Congress has continued to appropriate for the improvement of navigation on the San Joaquin ever since. Section 10 of the Rivers and Harbors Act of 1890, c. 907, 26 Stat. 426, 454, forbade obstruction of the navigable capacity of "any waters, in respect of which the United States has jurisdiction." In *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, this Court held that statute was applica-

ble to the Rio Grande River in New Mexico. By the Act of March 1, 1893, c. 183, 27 Stat. 507, 33 U. S. C. 661 et seq., Congress created the California Debris Commission "to mature and adopt such plan or plans * * * as will improve the navigability of all the rivers comprising [the Sacramento and San Joaquin River systems in the State of California], deepen their channels, and protect their banks." That commission is still functioning. In *United States* v. *Arizona,* 295 U. S. 174, this Court held that Section 9 of the Act of March 3, 1899, c. 425, 30 Stat. 1151, 33 U. S. C. sec. 401, forbidding obstructions in navigable waterways, applied to works in the Colorado River even when their construction was undertaken by the Secretary of the Interior. Surely, such a course of legislation does not indicate any congressional intent to relinquish the rights of the United States over its western rivers.

While the awards in these cases were apparently based on loss of natural flooding, the most numerous of the rights asserted in western streams are rights to divert water. The argument advanced by Claimants would, if accepted, put diversion rights in the protected class.

It can hardly be said that Congress has adopted a policy of recognizing vested rights to divert water from a navigable stream, when such diversion impairs navigability (see H. Doc. 395, 73rd Cong., 2nd sess., p. 327), while at the same time Congress has appropriated large sums for the improvement

of navigation, made it a crime to divert water from a navigable stream without permission (cf. *Sanitary District* v. *United States*, 266 U. S. 405), and created a commission to function exclusively in the preservation of the navigability of the very river in question here. This action by Congress indicates that it does not regard its powers over navigable rivers in the west as any different from those over such rivers elsewhere.

IV

There Has Been No Assumption of an Obligation by Ratification

Claimants contend (Br., pp. 27-34) that by the legislation dealing with the Central Valley Project the Congress has created a statutory obligation to pay respondents. The argument, in sum, is that from the original authorization down to the present the Bureau of Reclamation has asked and received appropriations for the acquisition of water rights; Congress has been informed of the purchase of water rights on the San Joaquin; repeated appropriation for that purpose constitutes ratification of the administrative construction of the Reclamation Act and "a ratification of the action of the Secretary as the agent of Congress in the administration of the act." Reliance is placed upon *Brooks* v. *Dewar*, 313 U. S. 354, and *Swigart* v. *Baker*, 229 U. S. 187. It is submitted that neither the facts nor the authorities cited lead to the result which is urged.

In the first place, the action of the Secretary in making payments and the action of Congress in making appropriations for that purpose is entirely consistent with the view (discussed in our main brief, pp. 63-65) that it may be desirable to make payments even though there is no legal obligation to do so. Thus, one reason assigned in 1940 by the Commissioner of Reclamation for the purchase of claimed water rights of Miller & Lux in the San Joaquin was the fear that if the Government proceeded in disregard of the claims of water rights, an injunction might be secured by "large" and "influential" interests which would delay work for years. The Commissioner expressed the view that conditions would not permit delay, so negotiation was made necessary. Hearings, H. Comm. on Appropriations, 76th Cong., Vol. 8, pt. 1, pp. 429-430.

In the second place, we have been unable to find, and claimants do not cite, any suggestion to the Congress that the purpose for which appropriations were sought was to bind the United States to satisfy claims which had no legal basis. It is true that Congress was informed, as shown above, that the money would be used in the settlement of disputes about water rights where to do so would advance other interests of the Government, but that is quite different from obligating the United States to pay claims.

It is elementary that an essential element of ratification is full knowledge. Thus, in *Brooks* v. *Dewar*, 313 U. S. 354, where this Court held that

other action by the Secretary had been ratified by Congress, it pointed out that (p. 360) "The information in the possession of Congress was plentiful and from various sources." But in this case the information before Congress as to the existence of an obligation to pay is, at best, ambiguous.

Claimants point to the long period of time covered by the series of appropriation acts and argue that this should be given weight. But at least since October, 1944, when the *Gerlach* case was decided on demurrer, and perhaps since October, 1943, when that case was filed, the uncertainties of litigation have made it necessary for the Bureau of Reclamation to make budgetary provision for water rights. And, since the decision on demurrer did not rest on the ground of an assumed statutory liability, subsequent action by the Congress cannot be construed as a legislative ratification of a judicial holding to that effect.

V

The Use of Friant Dam for Irrigation Is Subordinate to Its Use for Flood Control

Claimants contend in their brief (p. 46) that flood control by Friant Dam is an incident to irrigation and that any flood control benefits to commerce are both incidental and trivial. They argue to that conclusion by measuring costs against benefits and reason that, on the figures they state, the benefits to commerce are disproportionately small. As made, the argument is unsound but so are the facts upon which it is based.

For their facts as to flood damage and flood control benefits they cite the Report of the Chief of Engineers on San Joaquin River, H. Comm. on Flood Control, Doc. No. 2, 78th Cong., 2nd Sess. That report shows an average annual flood damage estimated at $1,460,000 (Table 20, p. 32), apart from the "intangible damages" of "losses resulting from the interruption of utility services including domestic, industrial, electrical power, telephones and railroads" and "loss to the traveling public", which the report says are not susceptible of valuation. Of this money total, they say only about $110,000 represents damage done to "roads, bridges, buildings, equipment and utilities", citing the same report at page 31. But the table on that page shows flood damage to such installations in the San Joaquin Valley for the year 1937-38 at $373,810 (compare Table 18, p. 29, with Table 19, p. 31) and, in addition, shows flood losses of well over $1,000,000 through "damage to levees and structures" and "expenditures fighting floods." (p. 32.) Claimants do not explain how they reached the figure of $110,000[2] or why damage to levees and the intangible losses to commerce should be ignored.

---

[2] In the year covered by the report, tangible flood damage was approximately three times the annual average. Perhaps claimants attempted to reach the average of the item which they discuss by taking one-third of the damage reported. Such method of computation is inadmissible since damages to particular installations will not follow the average. Thus, installations close to the river, such as levees, will suffer more frequently and more heavily from lesser floods than will installations farther removed.

Against their figures on benefits Claimants match a total estimated cost of $157,000,000 for the Central Valley Project on the San Joaquin. Admittedly, the larger part of the expenditures in that part of the project are for irrigation, but that has no bearing on the relationship of the purposes. It may be that flood control alone would not have justified the expenditure, but the fact that flood control is joined with other purposes does not strip the project of its flood control character.

It is submitted that the true test for determining the primary purpose of the dam is not a measuring of benefits against costs but, instead, involves the answer to the question of which purpose must yield when there is conflict. Congress has commanded that the dam be operated for flood control before irrigation (50 Stat. 844, 850), and the Secretary of the Interior has recognized that flood control "has a prior claim upon the operation of the reservoirs" and that "it is mandatory that preference in operating the reservoirs be given to navigation and flood control." H. Doc. No. 146, 80th Cong., 1st Sess., pp. 28, 29. For that reason, the space in Millerton Lake (Friant Reservoir) reserved for flood control is an annual mean of 67,800 acre-feet and for extreme floods will reach as high as 390,000 acre-feet, or nearly four-fifths of total capacity. Central Valley Project Studies, Allocation of Costs Problems 8-9, p. 66, Department of the Interior, 1947.

Moreover, since respondents' lands were benefited only by "the peak of the spring floods" (Finding 28, R. 87), it is apparent that it is the flood control function of Friant Dam which causes respondents' loss. Since the control of floods is clearly within the Government's servitude over the river for commerce, the damage is *damnum absque injuria* and respondents cannot be heard to complain of other operations of the dam which do them no harm.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
RALPH S. BOYD,
Attorney.

MARCH, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 4

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION *

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STATEMENT

Oral argument in these cases was concluded on March 1, 1949. On June 13, 1949, an order was entered whereby they were restored to the docket for reargument. In this brief, the Government will supplement its discussion of certain questions in view of the arguments advanced in the brief of respondents (hereinafter referred to as "Resp.

*Together with No. 5, *United States of America, Petitioner* v. *J. Sheldon Potter;* No. 6, *United States of America, Petitioner* v. *Martin Erreca;* No. 7, *United States of America, Petitioner* v. *James J. Stevinson, a corporation;* No. 8, *United States of America, Petitioner* v. *Archibald J. Stevinson;* No. 9, *United States of America, Petitioner* v. *3–H Securities Company.*

Br."), the brief of a number of western states (hereinafter referred to as "States' Br.") and the brief of Gill, et al., the plaintiffs in actions in the Court of Claims which are said to be similar to the cases before this Court (hereinafter referred to as "Claimants' Br.").

SUMMARY OF ARGUMENT

I

A. Under its authority to provide for the general welfare and to pay debts of the United States, Congress has, of course, power to recognize claims of a "moral or merely honorary nature." But legal defenses are waived or liability is assumed for moral claims only when Congress expressly so provides. If liability were to be inferred from language not explicitly addressed by Congress to the problem, its unlimited discretion in such matters would be invaded. For, in such a case, Congress would have been deprived of the opportunity to decide such matters as the extent of the liability to be assumed, the manner and means of its imposition, and the conditions upon recovery.

B. In this setting, it is clear that Congress has not assumed liability to respondents in legislation relating to the Central Valley project. The statutes relating thereto do not contain any language even remotely resembling a direction to pay respondents or others, or a waiver of a Governmental defense. On the contrary, the project

authorization in the 1937 Act was explicitly stated by Congress to be an exercise of its powers over navigable streams. An Act so grounded can hardly be read as a waiver of a right that is the Government's by virtue of those powers. This is certainly true when an assumption of liability is sought to be inferred from language merely appropriating funds for the purchase, *inter alia*, of "water rights." The language of appropriation is not a direction to pay. Even if it were to be so read, its obvious application would be to rights in non-navigable waters which were, in fact, affected by the project.

C. The contention that Congress has assumed an obligation to respondents in the legislation relating to the Central Valley Project assumes that respondents and others similarly situated unquestionably should be compensated. But there are opposing considerations which might well lead Congress to a contrary conclusion. Since respondents' lands were overflowed only during flood periods, their claim is for loss of a benefit which could be enjoyed only by inflicting flood losses upon other persons. There would seem to be little equity in such a claim.

Claims of rights to divert water from the river have even less stature. Those diversions, which substantially reduced the navigability of the river, were illegal and had the effect of depriving other persons of the benefits they might have enjoyed from navigation upon the river. If

appropriate action had been taken to obtain Congressional permission for such diversions, it is probable that authorization would have been granted only upon limitations and conditions. Recognition of a claim thus based upon failure or refusal to obtain the required authorization is not lightly to be imputed to Congress.

The plain fact is that the various factors bearing upon whether the liability here asserted should be assumed have never been presented to, or considered by, Congress. It is purely speculative what the Congressional conclusion would have been had the question been considered by it. And speculation will not serve as a substitute for the express language of assumption consistently required.

D. Congress has not granted or recognized private rights in navigable streams of the west. We have pointed out in the briefs previously filed that neither the decisions of this Court nor the language or purpose of the Act of July 26, 1866, the Desert Land Act, or the Reclamation Act, support such a contention. We show here that the actions taken by Congress and the administrative materials all confirm the contrary conclusion, and that the materials cited by claimants do not support their contentions.

The Act of March 3, 1891, as the Attorney General concluded shortly after its passage, did not affect the control over navigable streams which was vested in the Secretary of War. Similarly, a

construction of the Reclamation Act as constituting a grant of rights in navigable streams is refuted by the legislative and administrative actions with regard to legislation passed in 1905 and 1906. These demonstrate that, because of the River and Harbor Act, authority of Congress was necessary for the diversion of water from navigable rivers either by private interests or by the reclamation service. And even if the Act were to be construed as a grant of a right to use waters of navigable streams, it does not aid the respondents. For, under the Act, the "basis", "measure" and "limit of the right" must be "beneficial use" and the basis of respondent's asserted rights is not beneficial use but riparian location. Specifically, as to the San Joaquin River, a report of the Army Engineers made in 1917 pointed out that, because of the River and Harbor Act of 1899, the diversion of water therefrom was illegal in the absence of specific authorization.

There is nothing in the Federal Water Power Act and other statutes cited by the claimants which could constitute a grant to persons in respondents' position of rights to use the waters of navigable streams for irrigation, nor is their contention supported by the administrative decisions cited by the claimants. In contrast to these materials, it is the customary practice of Congress, when the federal control over navigable streams is waived, to act with reference to a particular body of water by declaring that it is not a navi-

gable water of the United States within the meaning of statutes relating to control of navigable waters.

E. The administrative action in purchasing water rights from Miller & Lux and others cannot be construed as an administrative construction that federal statutes impose a legal obligation to make such payments. The inconclusive nature of the administrative action is evidenced by the fact that the respondents in the present cases and the claimants in other cases who have filed a brief *amici curiae* themselves disagree as to what the administrative understanding was. Even if Congress had directed payment to Miller & Lux it would not follow that the respondents were entitled to collect. *United States* v. *McDougall's Adm'r*, 121 U. S. 89, 98.

II

A. The facts and authorities which demonstrate that Friant Dam was erected in exercise of the authority of the United States over navigable streams have already been fully set out in the briefs previously filed. The argument that there is a distinction in this regard between questions of constitutional authority to erect a dam under the commerce power and questions of compensability for the alleged taking of rights in navigable streams resulting from the erection of such a structure is fallacious. It represents, in fact, simply a repetition of the contention already re-

jected by this Court in holding that the authority over navigable streams may be exercised in aid of commerce and not merely for purposes of navigation.

B. Our general contention that there is no private property right in the flow of navigable streams as against the United States is not challenged but, rather, the argument is that the rule is different in the western states from that prevailing in the east. No such difference exists and the answer to the question as put by the States' brief—whether the rule of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, applies to navigable streams in the west—is clearly affirmative and, in fact, that rule has been so applied in at least two instances. *Continental Land Co.* v. *United States*, 80 F. 2d 104 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747.

ARGUMENT

I

THERE HAS BEEN NO STATUTORY ASSUMPTION OF LIABILITY TO RESPONDENTS

The brief for the claimants contends at length that it is unnecessary in these cases to determine any constitutional issue because there has been an assumption by Congress of an obligation to respondents (Points I–II; pp. 14–35). Respondents likewise urge a Congressional assumption of

liability (Br. 25–28). We shall, in this brief, outline those controlling principles and their application here as serve to demonstrate, in our view, that there has been no assumption of liability. As will more fully appear from the discussion herein, the same principles apply to the somewhat different but related contention advanced in the brief for the States.

A. *A claim against the United States, not otherwise grounded in law, can rest only on statutory language explicitly assuming liability.*— It is settled that Congress, under its authority to pay debts of the United States, may properly recognize claims "of a moral or merely honorary nature". *United States* v. *Realty Co.*, 163 U. S. 427, 440. And, in conjunction with its moral obligation to provide for the general welfare of the people (*Cincinnati Soap Co.* v. *United States*, 301 U. S. 308), Congress has undoubted power to appropriate funds for various purposes where there is no legal obligation to make payment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 586–587; *Helvering* v. *Davis*, 301 U. S. 619, 640; see *United States* v. *Butler*, 297 U. S. 1, 65–66. As stated in the *Realty Co.* case (p. 441): "Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of a moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its

foundation". See also *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 314.

But when Congress creates a claim against the United States not otherwise grounded in law, it does so expressly in language which is free from all doubt. See e. g., *Pope* v. *United States,* 323 U. S. 1; *United States* v. *Goltra,* 312 U. S. 203; *United States* v. *Klamath Indians,* 304 U. S. 119. This appears from the congressional practice and from judicial decisions with respect to acts of Congress said to constitute assumptions of liability. It is not to be assumed merely from passage of an appropriation act that Congress has created a legal claim which did not exist before. In all of the cases cited in the brief for the claimants (pp. 34–35), the direction to pay was explicit. Thus, in *United States* v. *Realty Co.,* 163 U. S. 427, the Act provided that bounties on sugar production "shall be paid by the Secretary of the Treasury," and similar mandatory language was used in *Medbury* v. *United States,* 173 U. S. 492 (excess amounts paid upon certain homestead entries "shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns"); *McLean* v. *United States,* 226 U. S. 374 (the proper accounting officers were "directed" to adjust the claim for back pay and emoluments); *United States* v. *Hvoslef,* 237 U. S. 1 ("the Secretary of the Treasury is hereby authorized and directed" to pay claimants for taxes illegally assessed and collected); and *United*

States v. *Laughlin*, 249 U. S. 440 (excess payments under public land laws "shall be repaid.").[1] In each instance, it was perfectly clear that Congress knew that, in enacting the statute, it was assuming a liability which either did not exist or could not be enforced. In *United States* v. *Hvoslef*, 237 U. S. 1, 10, this Court pointed out that the statute there involved "was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, * * *." Similarly, in *Dismuke* v. *United States*, 297 U. S. 167, 169, speaking of the provision of the Civil Service Retirement Act which declares that the employee "shall be entitled to an annuity" it was said, "The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay' ".

The reasons for requiring an explicit statutory assumption of liability are apparent. The recog-

[1] Most of these instances represent, in fact, simply a waiver of the sovereign immunity from suit rather than the creation of a legal obligation.

nition of moral claims "depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body." *United States* v. *Realty Co.*, 163 U. S. 427, 441. That discretion is not customarily exercised simply by a determination that a particular claim or type of claim deserves recognition. Instead Congress usually legislates with reference to related and collateral problems, depending upon the nature of the claim. Thus, Congress must decide whether it should provide "a forum for the adjudication of the claim according to applicable legal principles" (*United States* v. *Cumming*, 130 U. S. 452; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500), or whether the statute should simply direct an executive or administrative officer to pay a particular claim or class of claims. *Medbury* v. *United States*, 173 U. S. 492. Moreover, when the assumption of liability takes the form of a direction to an administrative officer, his determinations are sometimes made reviewable only for mistake of law or perhaps arbitrary or capricious action. *United States* v. *Laughlin*, 249 U. S. 440, 443; *Medbury* v. *United States*, 173 U. S. 492, 497. In other instances, however, the determination of the administrative officer is made conclusive. *United States* v. *Babcock*, 250 U. S. 328; *Work* v. *Rives*, 267 U. S. 175, 181–182; Pub. Law No. 896, 80th Cong., 2d sess., approved July 3, 1948, establishing the War Claims Commission; Pub.

Law No. 17, 81st Cong., 1st sess., approved March 15, 1949. In other instances, Congress specifically states the scope of judicial review. See Act of August 7, 1946, 60 Stat. 902.

Another regard in which Congress usually exercises its discretion is the question of a time limit for the filing of claims. Under the Tucker Act of March 3, 1887, 24 Stat. 505, now 28 U. S. C. 2501, the jurisdiction of the Court of Claims is limited to suits filed within six years from the time liability accrues. Cf. *District of Columbia* v. *Johnson,* 165 U. S. 330; *Tserionu, et al.* v. *United States,* 94 C. Cls. 142. It has been the frequent practice of Congress, especially in recent years, in statutes where liability is assumed for moral or honorary considerations, to impose much shorter time limits upon the presentation of claims. See Act of August 7, 1946, 60 Stat. 902, requiring the filing of claims with the interested department or agency within six months after passage of the Act and the filing of suit within six months after administrative action; Pub. Law No. 730, 80th Cong., 2d sess., requiring filing of suit in one year; Pub. Law No. 886, 80th Cong., 2d sess., requiring filing of claims within 18 months of passage of the Act. In the statute involved in *United States* v. *Hvoslef,* 237 U. S. 1, a period of less than two years for filing claims was allowed.

If something less than plain language were permitted to serve as an assumption of liability, matters of this sort, sometimes procedural, sometimes

substantive, and often important, would be left at large. It is in recognition of this wide discretion of Congress to determine the extent to which, if at all, liability should be assumed, that the courts have always insisted that an intention to assume liability must be explicitly stated in the statute. In every case, if the intention existed "it would have been easy to have said so in express terms", *United States* v. *Hotel Co.*, 329 U. S. 585, 590.

The importance, in a Congressional assumption of liability, that provision be made as to the extent of that liability and the means of its enforcement, has led to the conclusion that the absence of express language cannot be supplied by inferring from debates, committee reports and similar materials that an intention existed to assume liability. As this Court said in *United States* v. *N. Y. Rayon Co.*, 329 U. S. 654, 659, "Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms". Similarly in *Pine Hill Coal Co.* v. *United States*, 259 U. S. 191, a contention based upon the legislative history of the Lever Act was rejected by Mr. Justice Holmes, stating (p. 196):

> It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage. Here we have as against the

> arguments of the claimant the fundamental and necessarily governing consideration that rightly prevailed below. A liability in any case is not to be imposed upon a government without clear words.

See also *United States* v. *Zazove,* 334 U. S. 602, 617; *Maryland Casualty Co.* v. *United States,* 155 F. 2d 823, 826 (C. A. 4).

Thus, as held in *Mitchell* v. *United States,* 267 U. S. 341, a statutory assumption of liability may not be rested upon the fact that funds have been appropriated to pay losses resulting from the procurement of land for which the United States would not be chargeable under the Fifth Amendment. The Congressional action taken where such liability is held to be assumed is vividly illustrated by *United States* v. *Alexander,* 148 U. S. 186, cited in the *Mitchell* case, where the statute provided that "any person * * * who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may * * *" recover in the Court of Claims. Statutes by which, it is contended, a liability not otherwise existing is assumed, are subject to strict construction in determining whether there has, in fact, been an assumption of liability. Also, when it is clear that some obligation has been assumed, the same rule applies in determining who are the beneficiaries, the time for making claims and similar

details. "Viewed in the light of a gratuity, a gift, wholly without consideration, the statute itself must receive a strict construction; not such a construction as will prevent the fair meaning thereof from taking effect, but such as shall not be enlarged by inferences or implications not plainly to be drawn from the language of the act." *District of Columbia* v. *Johnson*, 165 U. S. 330, 338; *United States* v. *Goltra*, 312 U. S. 203, 210. Another application of this same principle appears in the rule that grants of public property are strictly construed and "nothing passes but what is conveyed in clear and explicit language." *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 272; see also *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257; *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546; cf. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86; *Ute Indians* v. *United States*, 330 U. S. 169, 179. In *Leavenworth etc. RR. Co.* v. *United States*, 92 U. S. 733, 740, this Court stated that "if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them."

B. *Congress has not assumed liability to respondents in legislation relating to the Central Valley Project.*—In view of the legal principles and legislative practice we have discussed, it is perfectly clear that the various enactments re-

lating to the Central Valley Project cannot be given the effect of a statutory assumption of liability. None of the statutes contain any words even remotely resembling a direction to pay, and none can be read, in the light of the strict rules of construction already referred to, as waiving rights of the United States. Much is made of the references to "water rights" in the administrative authorization of the plans for the project in 1935 (Respondents' Br. pp. 4–5, 9–10, 17, Appendix i–x; Claimants' Br. 4–5, 28). But, obviously, this administrative approval could not under any view constitute a Congressional assumption of liability. Certainly, the reference to the plan set forth in House Rivers and Harbors Committee Document Numbered 35, Seventy-Third Congress, as approved by the Act of August 30, 1935, 49 Stat. 1028, 1038, cannot be so construed.[2] The plan referred to was that adopted by the State of California and with respect to

[2] It should be noted that this reference is not to the plan approved by the Secretary of the Interior, so heavily emphasized by respondents and the claimants, but to the description of the project proposed by the State of California made in the report to Congress by the Chief of Engineers. The Central Valley Project involved navigable streams and it is clear that the approval of the plan under the Reclamation Act for construction out of funds allocated under the Emergency Relief Appropriation Act of 1935 could not constitute sufficient authorization for the project, Congressional action being required either by appropriating funds for the project or otherwise. Cf. *United States* v. *Arizona*, 295 U. S. 174.

which the Chief of Engineers, in document 35, recommended that the United States contribute $12,000,000 toward the state project. Obviously, the authority for such a contribution could not possibly constitute an assumption of liability by the Federal Government in any particular.

Reference is made (Claimants' Br. 28) to Section 2 of the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844, 850 (Gov't's Main Br. pp. 4–6), which reauthorized the Central Valley Project and empowered the Secretary of the Interior to acquire "by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes". This authorization cannot be tortured into an assumption of a liability which would not otherwise exist under the Fifth Amendment. Indeed, the reference to "proceedings in eminent domain" negatives such an idea since there is no suggestion that in such proceedings a rule of liability different from, and greater than, that ordinarily prevailing is to be followed. If condemnatio proceedings had been instituted under that statutory provision, their initiation would not have constituted an admission of liability. Instead, such proceedings would have merely furnished a forum where all issues of legal liability could have been determined. Cf. *United States* v. *San Geronimo Development Company*, 154 F. 2d 78 (C. A. 1), certiorari denied, 329 U. S. 718; *United States* v. *Chun Chin*, 150 F. 2d 1016 (C. A. 9); *Wittmayer* v.

United States, 118 F. 2d 808 (C. A. 9).[3] In those circumstances, the situation would have been analagous to that created by a special jurisdictional act which simply provides a forum for adjudication of claims and creates no legal liability. *United States* v. *Cumming*, 130 U. S. 452; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500.

An admission of liability to pay for the alleged rights to the waters of navigable streams is further contradicted by the fact that, in authorizing the project in the 1937 Act, Congress expressly stated that it was exercising its powers over navigable streams and directed that the structures should be operated, first, for the purposes of navigation and commerce. That legislative declaration precludes a reading of the Act as a direction to pay for damages for which the United States would otherwise not be liable because of its control over navigable streams. Moreover, the assertion (Claimants' Br. p. 28, fn. 25) that the phrase "water rights" necessarily referred to rights in navigable streams because the project involves the taking of water rights only from the

[3] See also *Albrecht* v. *United States*, 329 U. S. 599, holding that the fact that a contract is enforced in condemnation proceedings does not enlarge the Government's liability for interest. For other instances illustrating the general principle that claims are not waived by institution of condemnation proceedings, see *United States* v. *Turner*, 175 F. 2d 644 (C. A. 5), pending on petition for a writ of certiorari, No. 268, this Term; *United States* v. *Runner*, 174 F. 2d 651 (C. A. 10); *United States* v. *State of Oklahoma*, 168 F. 2d 858 (C. A. 10).

San Joaquin is not in accord with the facts. On the contrary, there are water rights in many non-navigable streams such as the Pitt River and the Fresno Slough of the Kings River in the Central Valley which will be directly affected by the Central Valley Project. See *Pitt River Power Company* v. *United States,* 98 C. Cls. 253, certiorari denied, 319 U. S. 747. Thus, for example, the Miller & Lux contract transferred to the United States rights in the waters of Fresno Slough, among others. The fact is that the claims that have been thus far asserted are not limited to the San Joaquin. Many claims for compensation have been made to the administrative authority with reference to the Sacramento River. For example, the City of Redding has asserted a right to recover damages because of the alleged violation of its right under California law to receive water of the same quality as it had before the construction of Shasta Dam because Shasta Reservoir reduces the amount of exposure of water of the river to the warming rays of the sun and thus makes it too cold for use in the City's swimming pool.

The fallacy of the argument based upon the use of the phrase "water rights" in the authorization of condemnation proceedings is demonstrable in another way. That authorization likewise refers to "rights-of-way" and, of course, there are many miles of rights of way which are

required for the various canals which are part of the Central Valley Project. A very substantial portion of those rights of way are located upon lands which were formerly part of the public domain and in which a right of way for irrigation ditches was reserved under the Act of August 30, 1890, 26 Stat. 391, see *Ide* v. *United States,* 263 U. S. 497. It is absurd to suppose that by authorizing condemnation of rights of way, Congress intended to assume liability for all such rights which had been reserved under the 1890 Act; nevertheless, that would be the result if the claimants' construction of this portion of the 1937 Act were accepted.

It is thus clear that there is nothing in the 1937 Act indicating a Congressional assumption of an obligation not otherwise existing to pay for alleged rights in navigable streams. The amendment made by the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, 1199–1200 (Govt.'s Main Br., pp. 6–7) likewise contains no such language.

The only other statutory language in all of the legislation referred to (Claimants' Br. 29–32) is the appropriation in the Act of July 12, 1943, 57 Stat. 451, 476, for "examinations, surveys and water rights". See statutes quoted at pages 81–96 of Government's Main Brief. This falls far short of the "clear words" assuming liability which must appear (see *supra,* pp. 13–14). In fact, the above-quoted phrase is even further removed

from an assumption of liability than the language employed in the appropriation act in the *Mitchell* case (*supra*, p. 14). There it was at least clear that the losses referred to would not have ordinarily been payable under the Fifth Amendment, while here it is not even clear that the phrase "water rights" was expanding liability since non-navigable streams are also involved (*supra*, pp. 18–19).

The attempted distinction of the *Mitchell* case on the ground that there a sufficient intention to widen accepted limits for recovery did not appear (Claimants' Br. 35) demonstrates that the argument here urged constitutes simply an attempt to use other materials from which a "statutory policy" is implied (Claimants' Br. 35) as a substitute for express language of Congress. This may not be done, see *supra*, pp. 13–14. See also *United States* v. *McDougall's Adm'r*, 121 U. S. 89, discussed *infra*, pp. 45–46 which is conclusive against the claim based on statutory policy.

Even if it could be assumed that the appropriation acts cited could constitute an assumption of liability, a further implication that a liability in excess of the amount appropriated had been assumed, would not be permissible. Cf. *Sutton* v. *United States*, 256 U. S. 575; *Hooe* v. *United States*, 218 U. S. 322, 332–333; 27 Comp. Dec. 662. Hence, respondents, the claimants who have filed a brief *amici curiae*, and the other parties who have filed suits could recover only by showing

that their claims do not exceed the appropriations. But, as stated in our petition for certiorari (p. 25), suits seeking to recover more than $2,000,000 have already been filed and a number of claims have been submitted for administrative disposition. Since many of these claims are for unliquidated amounts, it is impossible to tell whether available appropriations are sufficient to satisfy them. But it is unreasonable to conclude that Congress intended that those whose claims first matured in judgments should have the prior right. Here again the contrast with the procedure followed by Congress where it intends to assume a liability not otherwise existing vividly emphasizes the lack of merit in the present claim. When Congress is so minded, it either provides by a special jurisdictional act for a judgment by the Court of Claims to be paid in the usual manner or it expressly provides that the payment shall be made "out of any moneys of the United States not otherwise appropriated" *United States* v. *Hoslef*, 237 U. S. 1; see also *United States* v. *Realty Co.*, 163 U. S. 427; *Medbury* v. *United States*, 173 U. S. 492; *Bang* v. *United States*, 31 F. Supp. 535 (D. Minn.), affirmed, 117 F. 2d 515 (C. A. 8).

Neither the respondents nor the claimants have been able to fix on any particular act of Congress on which to rest their respective contentions that the liability here sought to be imposed on the United States has been assumed. The various

acts of Congress relied upon extend over a span of some fourteen years.[4] That being so, we are left entirely at large as to the date on which a limitation period, typically short in gratuitous legislation (see *supra*, p. 12), is to begin to run. Apparently the argument is that Congress intended that the time for filing suit should run from the date the claimant was damaged. But here again it is entirely speculative whether Congress would have so decided or would instead have selected some definite date. Moreover, as the court below has found, the respondents were at the time of trial getting all the water they ever got, and hence had not yet sustained damage. See Gov't's Main Br. pp. 74–75. The argument does not, therefore, support the judgments entered by the court below.

C. *The existence of a moral or honorary obligation to respondents is, at best, doubtful.*—Up to this point in our argument, we have assumed the existence of some obligation to the respondents and have pointed out that, even on that assumption, there is no basis for the contention that

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[4] Rule 11 of the Court of Claims requires that "If the claim is founded upon an act of Congress * * * the act and the section thereof on which plaintiff relies shall be specified." The petitions in four of these cases referred to 14 acts of Congress (R. 8–9, 24–25, 50–52, 152–154), while two of them contain no such references (R. 154–157, 157–160). It is, at best, doubtful whether these petitions complied with the rule. See *McMahon* v. *United States*, 104 C. Cls. 366.

Congress has chosen to honor such obligation. We shall now retrace our steps, in a sense, in order to question respondents' basic premise that they have claims which, if not legally justifiable, are morally so.

Respondents have the heavy burden of convincing the Court that the Congress has assumed a legal obligation to compensate them for losses which they had not suffered at the time most of the legislation relied upon was enacted or even at the time of trial in the court below. See Gov't's Main Br., pp. 74–75. The judgments there entered awarded amounts for the future loss of benefits respondents enjoyed from the uncontrolled floods of the San Joaquin River. Even though, for legal purposes, the California courts include these annually recurring floods as part of the normal flow of the river, the fact remains that these floods cause loss of life and serious damage to homes, industries, transportation facilities and crops. The result is that heavy expenditures are required both by local interests and by the Government to minimize the effects of these floods. There would seem to be little equity in the claim of a right to pasture cattle which can only be enjoyed by inflicting losses of this sort upon others, especially when (a) for such purpose only a small amount of the water is actually absorbed while the larger part flows on to do its damage and then to waste into the sea (R. 103), and (b) with minor exceptions, no works have been

built nor investments made in order to take advantage of such flow. In this connection, it should be emphasized that, while respondents' argument is pitched on the assertion that the purpose of Friant Dam was irrigation of other lands, it is the flood control feature which causes their damage. As we have previously pointed out (Gov't's Main Br. 57–58), the damage would be the same whether the flood waters were diverted or simply stored and released later. The injury to respondents would have been exactly the same if the floods had been controlled by a system of levees holding the river within its channel during flood periods resulting in discharge of those waters into the sea. Respondents could not complain if such a procedure had been followed. As to the flood waters, the only difference between such a method of control and the method adopted is the fact that Friant Dam provides a means of accomplishing the same result and, at the same time, so far as possible, puts the flood waters to beneficial use rather than having them waste into the sea. Certainly, the fact that the flood waters might thus be used for irrigation does not improve respondents' position.

The respondents' arguments would, of course, impose a legal obligation on the United States running not only to them but to others whose claims are of different types. Illustrative is the claim of the East Side Canal Company, which was consolidated with the present cases for trial but

was remanded to the commissioner for further findings. R. 74; see *East Side Canal Company* v. *United States,* 76 F. Supp. 836. The claimants and the states argue that the problem is the same whether riparian or appropriative rights are concerned (Claimants' Br. 15; States' Br. 8). And, as respondents recognize (Br. 27–28), these various alleged rights encompass practically the entire flow of the river. But the diversions made by the East Side Canal Company and others in a similar position could only be legal if a permit therefor had been obtained from the Secretary of War and the illegality of such diversions without permits has been noted. H. Doc. No. 332, 65th Cong., 1st Sess., p. 56. See *infra,* pp. 38–40. It is clear that had application for permits been made, the Secretary would have been obliged to reject them since the diversions would destroy the navigability of the river (see H. Doc. No. 395, 73rd Cong., 2d Sess.) and if the matter had been presented to Congress, it is probable that the diversions would have been authorized, if at all, only with limitations and restrictions. Compare the action taken by Congress with reference to the Sacramento River in the Act of May 9, 1906, 34 Stat. 185 (see also H. Rept. No. 3216, 59th Cong., 1st Sess., relating thereto, *infra,* pp. 33–34) and the bill suggested in 1917, relating to the San Joaquin River diversion, which provided that the United States would not object to certain diversions prior

to July 1, 1945 (H. Doc. No. 332, p. 70).[5] Thus, the claims based upon unlawful diversions are probably much more extensive than the value of diversion rights which would have been given had application for authorization been made. There would seem to be little equity in a claim thus founded upon failure or refusal to obtain the required permission. Certainly, having enjoyed this illegal benefit for many years, the diverters would not seem to be in a position to demand compensation when that advantage is lost. And further militating against these claims is the fact that the diversions destroying navigation were at the expense of other persons who might have enjoyed the benefit of navigating upon the river. No means of reading into the statutes an obligation running to riparian owners but not to appropriators is suggested. The fact that respondents' arguments would lead to the imposition of liability as to both is striking evidence of the wisdom in the rule that liability is to be deemed assumed only when Congress has explicitly assumed it.

Moreover, even when the project is physically completed, respondents and other persons who have been receiving water from the San Joaquin

[5] Similarly under the California Debris Commission Act of March 1, 1893, 27 Stat. 507, 33 U. S. C. secs. 661–687, hydraulic mining is prohibited in the territory drained by the Sacramento and San Joaquin Rivers except by permission of the commission. *United States* v. *North Bloomfield Gravel Min. Co.*, 81 Fed. 243 (C. C. N. D. Cal.).

River will not be automatically deprived of all benefits. While the findings of the Court of Claims indicate that the reduction in natural flooding of respondents' lands was the controlling factor considered in determining the amounts awarded (Fdgs. 56, 62, 87, R. 110, 113, 128; St. Fdgs. 42, 46, 49, R. 188, 190, 190-191), the rights claimed by them were not so limited but included other uses of the flow of the river, such as use for domestic purposes, for the purpose of watering livestock (Fdg. 28, R. 87–88), and in the case of Martin Erreca, No. 6, for the purpose of subirrigation by seepage and for irrigation by pumping water from the river (Fdg. 62, R. 113). Such benefits will be lost only to the extent that water is diverted from the river. And water will be diverted through the Friant-Kern and Madera Canals only to the extent that sales thereof are made to persons within the area served by the canals. Such sales are limited by the provision of Section 5 of the Reclamation Act of 1902, 43 U. S. C. 431, that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner. See Montgomery and Clawson, *History of Legislation and Policy Formation of the Central Valley Project* (U. S. Dept. of Agr., Bu. of Agric. Econ., Berkeley, Calif., 1946), pp. 131-176. Thus, the amount of water to be used does not depend simply on the will of the government officers but, rather, it is contingent upon the willingness of

qualified potential users to make contracts to purchase it. Since, even in respondents' view of the case, their rights are subordinate to the rights acquired by the United States from Miller and Lux, diversion of water by the Government will not impair the rights claimed by respondents until the sales of water exceed the Miller & Lux rights (see R. 81-83). Certainly, there is no basis for a conclusion that in the legislation relating to this project, Congress assumed an obligation to pay for water which may never be needed. Yet that would be the result of acceptance of the contention here urged.

None of the materials cited by the respondents or claimants indicate that any of these factors relating to the question whether respondents have a moral claim were ever considered by Congress. It is completely speculative as to what the conclusion of Congress would have been in this particular. This disposes not only of the argument based on the language of the statutes but also of the suggestion that there has been an administrative determination of a moral obligation which has been ratified by Congress (Claimants' Br. pp. 33–34; see also Gov't's Reply Br. pp. 9–11).

To summarize: There are three possible interpretations of the legislation upon which the respondents rely. First, that Congress intended that only valid existing rights should be paid for,

but this view would not aid respondents. Second, that Congress intended to authorize the purchase of claimed rights, whether they were legally enforceable or not, when it was desirable to do so in order to permit the project to proceed without the delays incident to litigation of such questions if injunction proceedings should be instituted or otherwise to advance the interests of the government. This construction likewise does not support claimants' contention. Their argument necessarily is, therefore, that the legislation means that Congress not merely authorized but *directed* that payment be made for all water rights claimed even though such alleged rights were not valid as against the United States, and even though such alleged rights might never be needed for execution of the governmental purpose. Plainly the statutes cited cannot be construed as constituting such a gift.

D. *Congress has not granted rights in the waters of the San Joaquin River to respondents.*—It is contended that Congress has treated the west differently from the east, that it has either granted or recognized western water rights, or that Congress has "subordinated" its control over navigable streams in the west to local water right law (States' Br. 15, 17; see, also, Claimants' Br. 18–27). The same principles concerning the construction of statutes in which Con-

gress is alleged to have assumed a liability not otherwise existing or have granted public property to individuals (*supra*, pp. 8–15) are applicable to these contentions.*

We have previously pointed out that neither the language nor the purpose of either Section 9 of the Act of July 26, 1866 (Reply Br. 3–4), the Desert Land Act (Gov't's Main Br. 47, 68), or Section 8 of the Reclamation Act of 1902 (Gov't's Main Br. 66–71, Reply Br. 4–6) lends support to a contention that thereby Congress has assumed liability to respondents or relinquished its rights in navigable streams. Moreover, as we have already pointed out (Gov't's Main Br. 68–71, Reply Br. 7–9), the decisions of this Court, the actions taken by Congress, and the administrative material, all confirm the conclusion that the statutes cited do not constitute grants of private rights to the waters of navigable rivers, nor do they in any way subordinate federal rights to local law. Neither the statutes nor the administrative materials cited by the claimants indicate otherwise. We shall, in this

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* Compare the statement in *Slidell* v. *Grandjean*, 111 U. S. 412, 437, quoted in *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257, that when there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest" the doubt is resolved in favor of the government.

section of the brief, attempt to make a further showing of the accuracy of this statement.

1. *The Act of March 3, 1891, 26 Stat. 1095.*— Attention is called (Claimants' Br. 39) to certain language in the Act of March 3, 1891, 26 Stat. 1095. Section 18 of that Act provides for the grant of a right of way over public lands to canal or ditch companies for irrigation purposes and concludes with the language cited by the claimants, that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Only a few years after passage of this act, the Secretary of War requested an opinion of the Attorney General whether the Secretary of the Interior had authority to authorize construction of a dam across the Rio Grande under Sections 18 to 21 of the 1891 Act, no approval thereof having been given by the Secretary of War. Attorney General McKenna concluded that no such authority was granted by the 1891 Act, stating, "There is nothing in the act or its purposes which was intended to affect the control or supervision of the navigable rivers of the country. That, by other and indeed later legislation, is put in the Secretary of War." 21 Op. A. G. 518, 520. The opinion then quotes Section 10 of the River and Harbor Act of September 19, 1890, 26 Stat. 454, and Section 7 of the Act of July 13, 1892, and concludes, "These provisions are very definite, and

the answer to your inquiry is obvious if the stream be a navigable one. This you assert, and I assume it." See also *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 705–707.

2. *The Reclamation Act of 1902.*—The construction sought to be given the Reclamation Act of 1902 by respondents and claimants is refuted by legislative interpretations of that Act.[1] Thus, despite its passage, Congress twice, within four years, found it necessary to enact legislation in order to permit diversions of water of navigable rivers for irrigation purposes by private interests in the one case and the reclamation service in the other. By the Act of May 9, 1906, 34 Stat. 185, the Central Canal and Irrigation Company was granted a right to divert specified amounts of water from the Sacramento River, one of the rivers in the Central Valley Project, for purposes of irrigation, subject to various restrictions. The reports of the committees of the House and Senate describe the situation in detail and state *inter alia* (H. Rept. No. 3216, 59th Cong., 1st Sess., pp. 2, 5–6; S. Rept. No. 2900, 59th Cong., 1st Sess., pp. 3, 6–7):

> The legislation seems to be necessary in order that suitable works and structures may be erected on a navigable stream and

[1] Legislative construction is, of course, entitled to great weight (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309), especially when it is practically contemporaneous. Cf. *United States* v. *Mine Workers*, 330 U. S. 258, 281–282.

permit the diversion and the use for irrigation of such water of the stream as is not absolutely necessary for navigation purposes, which otherwise would be illegal under existing law. The bill permits this to be done under restrictions and safeguards which protect navigation, so far as possible under the circumstances, and prevent serious injury to the navigable stream.

* * * * * *

At the time of organization of central irrigation district the State of California had full and absolute control of the waters of the Sacramento River and all navigable streams wholly within its borders. It was not until September 1890, that the Federal Government assumed control for the purposes of navigation of the navigable waters of California.

Both administrative and legislative recognition of the fact that the Secretary of the Interior was likewise limited by the Rivers and Harbors Act in the construction of projects under the Reclamation Act appears from the history of the Act of March 3, 1905, 33 Stat. 1045, authorizing the Secretary to construct dams for such purposes in the Yellowstone River in Montana. In recommending passage of this bill and a companion bill, the Director of the Geological Survey, with the concurrence of the Secretary of the Interior, stated:

This legislation is intended to overcome the technical objection to such works due to

> the fact that the said rivers are technically navigable and as such are embraced within the provisions of the River and Harbor Act of March 8, 1891 [sic] (30 Stat. 1121) [which prohibits the placing of obstructions in navigable streams except by special authority of Congress]. While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.*

The report of the House Committee on Irrigation of Arid Lands relating thereto states (H. Rept. No. 4834, 58th Cong., 3d Sess.):

> The reclamation service of the Geological Survey, having charge of the construction of irrigation works under the national reclamation act, has in contemplation the construction of irrigation works in Montana, using the waters of the Yellowstone River for the irrigation of arid lands. The Yellowstone River in its lower reaches, where it is proposed to construct these works, was at one time used in a very limited way for the purposes of navigation, though it has not been so used in a commercial sense for many years; and in order that there may be no question as to the authority of the Secretary of the Interior to construct dams across the river, to be used in the diversion of waters for irrigation, the building of which dams

*The complete text of these unpublished letters is set out in the Appendix, *infra*, pp. 56–62.

> would impede navigation if the same existed, it has been deemed wise to pass the bill herein proposed.

This report has special significance since it was submitted by Mr. Mondell of Wyoming who had been in charge in the House of the bill which became the Reclamation Act of 1902 (see Claimants' Br. 20) and since the conclusion of the committee would seem to be confirmed by this Court's decision in *United States* v. *Arizona*, 295 U. S. 174, holding that the Secretary of the Interior could not construct Parker Dam without the consent of Congress.

Moreover, the construction of the Reclamation Act urged by the respondents and claimants does not aid the respondents. Section 8 of that Act contains the proviso "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and *beneficial use shall be the basis, the measure, and the limit of the right*" 32 Stat. 388, 390; 43 U. S. C. sec. 372. [Italics supplied]. We believe that, correctly construed, the section does not grant any rights and that the proviso simply establishes the rule controlling use of the water distributed by the government project. See Gov't's Main Br. pp. 67–68. But even if Section 8 were construed as an authorization for the acquisition of some kind of rights under state law, the proviso, which applies to the right to use of the water "under the provisions of this Act," would exclude the

rights here claimed by respondents. The only rights claimed by respondents are riparian, the existence of which is based solely upon the geographical relationship between their lands and the river. Resp. Br. 4, 40–41, 44–45.* They have no foundation in beneficial use. Thus in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, the court, in describing the nature of riparian rights pointed out at p. 95: "The right to the flow of water *is inseparably annexed to the soil,* and passes with it, not as an easement or appurtenant, *but as a parcel.* Use does not create, and disuse cannot destroy or suspend it." (Italics by the court). And at pages 96–97 it quoted from an earlier California case that "The plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands * * *." The right arising under the appropriation doctrine is of an entirely different nature. As this Court stated in *Ickes* v. *Fox,* 300 U. S. 82, 94, after referring to the proviso of Section 8, "Under the Reclamation Act, *supra,* as well as under the law of Washington, 'beneficial use' was 'the basis, the measure and the limit of the right.'" The appropriative right is created by beneficial use. "The first ap-

* In response to our contention that the Court of Claims failed to make a finding describing the property interest taken (Gov't's Main Br., point V, pp. 72–73) respondents rely (Br. 32) upon the allegations of their petition that as owners of the land they were "entitled to all rights of riparian owners with respect" to the river (R. 2, 19, 46, 150, 155, 158).

propriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 154; see also *Atchison* v. *Peterson*, 20 Wall. 507, 510–511. The right is thus measured by reference to such use and does not extend to all the water in the stream. And, unlike the riparian right, disuse destroys it. As the court below held in the companion case of *East Side Canal Co.* v. *United States*, 76 F. Supp. 836, 839, appropriative rights are lost by the failure to apply water to a beneficial use. To support its holding, it cited *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450; *Smith* v. *Hawkins*, 110 Cal. 122. It is thus clear that the rights claimed by the respondents are unaffected by the Reclamation Act.

3. *Specific proposals for the San Joaquin River.*—As to the San Joaquin River, a report of the district engineer, made in 1917 and concurred in by the division engineer, pointed out (H. Doc. No. 332, 65th Cong., 1st sess., p. 56):

> So far as can be ascertained here all diversion of water from the San Joaquin and its tributaries above Stockton are in violation of the river and harbor act of 1899, no congressional acts or department permits having authorized them. It is believed that the time has come when this matter should no longer be allowed to remain simply in a state of indifferent tolerance. The situation here is, in general

principles, very similar to that considered for the upper Sacramento River, as covered in the latter portion of a report on the preliminary examination of that river, submitted by the Sacramento Feather River Board under date May 17, 1916. (H. Doc. 1893, 64th Cong., 2d sess.)

There is, therefore, recommended the enactment of general legislation to the effect that the United States will not interfere under its paramount navigation protection rights with the diversion of water for irrigation purposes from any part of the San Joaquin River watershed draining past the mouth of Merced River until July 1, 1945, and that during the session of Congress beginning in the December of 1944 the California Debris Commission shall report, through the Chief of Engineers and Secretary of War, to Congress, with recommendations, and reasons therefor, on the subject as to whether this period should then be extended or whether those interests diverting water from the stream should be required to compensate therefor during certain low-water periods to permit navigation.

There was attached (pp. 70–71) a proposed form of bill which provided that the United States would not interfere with or object to the diversion of water for irrigation purposes in a specified area before July 1, 1945, "*Provided*, That, except as to the diversion of water for irrigation purposes, the existing laws for the pro-

tection and preservation of the navigable waters of the United States shall remain in full force and effect." The division engineer concurred in the recommendations of the district engineer (p. 57). The report of the Board of Engineers stated (p. 5) that it "does not consider the special legislation proposed by the district officer to be essential. It recommends, however, that no objection be made by the department to the diversion of water from the San Joaquin River and tributaries for irrigation purposes." The Chief of Engineers concurred generally in the views of the district engineer, the division engineer and the board. Thus, the appropriate administrative authorities have recognized that the federal control over the San Joaquin River has not been subordinated to local law as to use of water for irrigation.

4. *The Federal Water Power Act and other statutes cited by the claimants.*—The federal control over navigable streams was again exercised in the Federal Water Power Act of June 10, 1920, 41 Stat. 1063. Here again no distinction was made between eastern and western streams and, in recognition of the applicability of the act to the San Joaquin, power companies have secured permits as required thereby (R. 34). Reliance is placed (Claimants' Br. 40–41) on Section 27 of the Act, 16 U. S. C. 821. But like the similar language of Section 8 of the Reclamation Act, this is not a grant of rights or a waiver of immunity. (See Gov't's Main Br. 67–68).

Rather, as this Court stated in *First Iowa Coop.* v. *Power Comm'n,* 328 U. S. 152, 175, it is a "saving" clause,[10] and neither grants nor creates new rights superior to the Federal Government's right to control navigable waters. The clause represents simply a refusal to confer upon licensees all federal authority as to navigable streams. *Great Northern Ry. Co.* v. *Washington Electric Co.,* 197 Wash. 627; cf. *United States* v. *Central Stockholders' Corporation,* 52 F. 2d 322, 330 (C. A. 9). The reference to similar provisions in other acts (Claimants' Br. 39) likewise adds nothing to the argument since, as stated in *City and County of San Francisco* v. *Yosemite Power Company,* 46 L. D. 89, 96, with reference to Section 11 of the Raker Act of December 19, 1913, 38 Stat. 242, 250: "The language of section 11 is similar to that contained in section 8 of the Reclamation act of June 17, 1902 (32 Stat., 388), and there is nothing in the language of either section to indicate that the intent of Congress was to go further" in the other acts than it did in the Federal Power Act.

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[10] In the debates in Congress cited in the *First Iowa* case (328 U. S. at p. 177) Mr. Mondell, who had been in charge of the bill which became the Reclamation Act (*supra*, p. 36), pointed out the similarity of the Water Power Act provision to Section 8 of the Reclamation Act, which, he stated, "is simply a recital of what is the law and recognizes the conditions under which the Secretary of the Interior is to proceed to the development of his enterprises", 51 Cong. Rec. 13631.

5. *Customary method of surrender of federal control.*—When particular instances make it desirable to waive the federal control, it is done by a declaration that the particular body of water is not a navigable water of the United States within the meaning of the laws enacted by the Congress for the preservation and protection of such waters. See the various acts codified in 33 U. S. C. secs. 21–55. In this regard, no distinction is made between eastern and western states, but, rather, express provision is made for particular streams in the arid land states. See Act of October 23, 1913, 38 Stat. 233 (Oregon); Act of February 26, 1917, 39 Stat. 937 (Oregon); Act of March 10, 1937, 50 Stat. 28 (Texas); 33 U. S. C. secs. 34, 39, 50. These are merely additional examples of the general principle that governmental rights are waived or liability assumed only by specific legislation relating to a particular situation.

6. *Administrative decisions.*—There is nothing in the administrative decisions cited by the claimants to support their contentions (Br. 26). While they assert that in *Theodore A. Iasigi,* 39 L. D. 285, the Department of the Interior "recognized for a desert land entry the validity of water rights * * *" to the use of water from the Colorado River, such is not the case. Nowhere in that opinion is the validity of the claimed right even considered. Instead, the entryman's application for a patent was rejected because the

water available to him could not be used on the land he sought even if the right were all he claimed it to be. *Underground Water Claims, Utah*, 55 I. D. 378, again recognizes that the Desert Land Act of 1877 is limited to nonnavigable waters. After quoting from *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, it was stated (p. 379): "Having thus surrendered its primary rights to nonnavigable waters on the public domain * * *." Like the underground water involved in the *Utah* decision, the subject matter of the other three decisions cited (Claimants' Br. 26, fn. 21) plainly had nothing to do with navigable wafers of the United States. And there was no occasion to discuss any question relating to such waters.[11]

This history demonstrates that, contrary to the arguments advanced by the claimants, the uniform understanding of this Court, as well as of both Congress and the administrative authorities, has been that all navigable streams, eastern and western, are subject to the same control which has been exercised by the California Debris Commission Act, the Rivers and Harbors

[11] The decisions in *Jackson Hole Irrigation Co.*, 48 L. D. 278, and *Myers and Myers*, 49 L. D. 106, cited by claimants in footnote 21 (Br. 26), related to intrastate lakes which, even if they are assumed to be navigable, would not be navigable waters of the United States. *The Montello*, 11 Wall. 411, 415. It does not appear that any navigable waters were involved in the third decision, *Authority to Cause Diversion of Waters*, 57 I. D. 400.

Acts of 1890 and 1899, and the Federal Power Act, and that the various acts cited by the respondents, the claimants and the States, have in no way limited this control nor subordinated it to local law as to use of water for irrigation or any other purpose.

E. *The payments made to Miller & Lux and others do not constitute an administrative construction supporting the contentions of respondents and the other claimants.*—In support of both the arguments that an obligation has been assumed in legislation relating to the Central Valley Project and that the various other statutes constitute a relinquishment or subordination to local law of the federal authority over navigable streams in the west, much reliance is placed upon the fact that payments were made to Miller & Lux and others as constituting an administrative construction supporting their argument. The argument, however, ignores the distinction between an authorization to spend money for a particular purpose and the existence of a legal right of the beneficiary thereof to compel such payment. We have previously pointed out (Reply Br., p. 10) that the making of payments is entirely consistent with the view that no legal obligation to do so exists.

The mere fact that payments were made does not aid respondents or the claimants since even if Congress itself had directed such payments, recovery would not be justified. In *United States*

v. *McDougall's Adm'r*, 121 U. S. 89, special acts had been passed authorizing recovery by certain claimants for certain cattle furnished to Indians in California, and the Court of Claims had entered judgments, which were not appealed, granting recovery to other persons in the same class on the ground that there had been legislative recognition of the obligation of the United States to pay such claims. This Court, however, reversed the holding granting a similar award to McDougall's administrator, saying (p. 98):

> That Congress, by special acts, made provision for the payment of particular claims of the same class furnished no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. Such legislation may well furnish the basis for an appeal to the legislative department of the government to place all claimants, of the same class, upon an equality. But we are aware of no principle of law that would justify a court in treating the allowance by Congress of particular claims as a recognition by the government of its liability upon every demand of like character in the hands of claimants. We may properly take judicial notice of the fact that many claims against the United States cannot be enforced by suit, but provision for which may, and upon grounds of equity and justice ought

to be, made by special legislation. But the discretion which Congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it cannot appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class.

The same considerations apply to the suggestion that the liability of the United States to McDougall's administrator, as upon contract, may arise from the failure or refusal of their law officers to prosecute appeals from judgments against the government in suits brought by other parties, holding similar claims. The question to be determined is, not whether the representatives of the government have heretofore been guilty of neglect in not prosecuting such appeals, but whether, in the case in hand, the plaintiff has a valid claim in law against the United States.

It is equally difficult to see how the fact that payments were made could constitute an administrative construction that a legal obligation exists to make such payment when there is nothing to show that consideration was given either to the many authorities or to the various factual matters which are relevant to such a conclusion. In this connection, it should be noted that respondents and the claimants take divergent views as to what the administrative position was. Claimants

suggest (Br. 28) that "It has never occurred to anyone, until this litigation, that the rights to this water might be seized for the purpose of resale, without compensation." On the other hand, respondents state (Br. 28): "The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation." Thus, although they reach the same ultimate result, respondents and the claimants are in disagreement as to what the administrative understanding was. In such circumstances, it cannot be said that there has been an administrative construction of an ambiguous statute or statutes which aids the interpretation thereof.

There is another particular in which the distinction between a legal obligation to take action and the desirability of doing so is ignored. Emphasis is placed upon the amount expended in transferring water from the Sacramento River to the San Joaquin Valley and it is said that this heavy expenditure "is wholly unnecessary if the Solicitor General's argument be sound" (Claimants' Br. p. 29). But it is perfectly clear from the history of the Central Valley Project that the transfer of water was not authorized because of a belief that a legal obligation existed to supply water to persons in the San Joaquin Valley. On the con-

trary, it was done for the purpose of putting all the waters of the Central Valley to best use to serve all interests and was not based upon legal obligations that might exist as to any of those interests. See Govt.'s Main Br. 30–32. The fact that a particular action is taken obviously does not imply that there is a legal obligation to take it.

II

THE FRIANT DAM WAS ERECTED IN EXERCISE OF THE AUTHORITY OF THE UNITED STATES OVER NAVIGABLE STREAMS, AND RESPONDENTS HAVE NO PROPERTY RIGHTS AGAINST THE UNITED STATES IN THE FLOW OF SUCH STREAMS

A. *The Friant Dam was erected in exercise of the authority of the United States over navigable streams.*—We have shown in our main brief (pp. 24–39) and our reply brief (pp. 11–14) that Friant Dam was erected in exercise of the constitutional authority of Congress over navigable streams and that the assertion (Claimants' Br. 46) that Congress understood that Friant Dam "was intended to produce only irrigation benefits" is contrary to the express declarations and directions of Congress. However, a distinction is sought to be made between questions of compensability and of authority, the contention being that while the project was authorized under the commerce power, the issue is different when the question is one of compensability for the taking of navigable waters (see Claimants' Br. 44, 47). It has never been suggested by this Court

that while a project relating to a navigable river was constitutionally authorized under the commerce power, nevertheless, the governmental immunity from liability in such cases is inapplicable. The argument constitutes simply another phrasing of the attempt to limit the power over navigable streams to control for navigation, which as this Court has pointed out, is not so limited but instead is as broad as the commerce power. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508; *United States* v. *Commodore Park*, 324 U. S. 386. Indeed, substantially the same argument in somewhat different form was rejected by this Court in the *Appalachian Power* case. It was there argued that even though the stream was navigable, certain provisions of the license, required by the Federal Power Act, were beyond the power of Congress to impose because they would constitute a taking of property without payment of just compensation. This contention was rejected, the Court stating, *inter alia* (311 U. S. at p. 427): "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power."[12] Thus the au-

[12] It should be noted that this Court at 311 U. S., pages 424–426, explained the meaning of the language in *United States* v. *River Rouge Company*, 269 U. S. 411, 419, *Kansas* v. *Colorado*, 206 U. S. 46, 85–86, and *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63, which is nevertheless relied upon by the claimants (Br. 48–49).

thority of Congress to undertake activities upon navigable streams without liability for loss of benefits enjoyed in the flowing waters is coextensive with its authority to regulate such activities by others. This is implicit in decisions such as *United States* v. *Commodore Park*, 324 U. S. 386, and *United States* v. *Willow River Co.*, 324 U. S. 499, rejecting claims for compensation. The power transmission line example given by claimants (Br. 44) further demonstrates the fallacy of their argument because, of course, lands may not be taken without payment of compensation for a navigation improvement or any other purpose, but no right to compensation arises from use of navigable waters for commerce clause purposes.[13]

The decision in *International Paper Co.* v. *United States*, 282 U. S. 399 (Claimants' Br. p. 48), is irrelevant since there the authority over navigable streams was not sought to be exercised, while, here, Congress has expressly declared that the project is for the purpose of "improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods * * *" etc. The reliance placed

[13] The understanding that constitutionality of the project and compensability present the same issue is also illustrated by the fact that there are now pending in the United States District Courts for the District of Columbia and for the Southern District of California cases which seek to enjoin, for lack of constitutional authority, the taking of alleged water rights in the San Joaquin River by erection of Friant Dam.

upon this decision is, we submit, further demonstration that the claimants are seeking simply to ignore the congressional declaration.

B. *Owners of land riparian to a navigable river do not own the flowing waters as against the United States.*—Respondents apparently do not controvert our general contention (Main Br. 39–48) that there is no private property in the flow of navigable streams as against the United States. And *amici curiae* seem to concede the general rule. Thus, the brief of the States founds its argument completely on the alleged difference between eastern and western states and the claimants similarly argue for a different result in the western states from that prevailing in the east. In fact, these arguments represent simply a reiteration of the contention that there has been an assumption of liability or a waiver of the governmental authority over navigable streams. As the States' brief puts it (p. 15), "The main question now appears to boil down to this: Is the rule of the *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the correct rule to apply to consumptive water rights on navigable streams in the West?"

But no mention is made of the fact that the rule of the *Chandler-Dunbar* case has been applied in the western states. *Continental Land Co.* v. *United States*, 88 F. 2d 104, 109 (C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747. Since no at-

tempt is made to distinguish these cases, the position apparently taken is that they should be overruled. A distinction cannot be made between use of water for purposes of irrigation and use for power purposes. Neither riparian nor appropriative water rights are limited to use of water for irrigation but they include use for mining, municipal, industrial, power and other beneficial purposes. Indeed, as the historical summary of the States' brief emphasizes (pp. 5–6), the new system originated from the need of water in placer mining, was referred to as the custom of miners, and the 1866 Act referred to use of water "for mining, agricultural, manufacturing, or other purposes". The fact is that the use of water for power might well create less interference with navigable streams than use for irrigation. Although power use sometimes consumes the water, this is obviously less frequent than the diversion of whole streams from their beds for irrigation (States' Br. p. 7). Thus, if a distinction were to be made on the basis of use it would more logically favor power uses over the much more destructive irrigation uses. The fact is that no distinction has ever been made. The States' argument is thus contrary to precedent and is an attempt to create rights where none have existed heretofore.

It is said that water users in the west "have believed themselves shielded by the Acts of Congress" (States' Br. p. 16). Whether they have is, of course, a matter of conjecture but, even if they have, it is of no moment. The argument is similar to the

claim of estoppel against the Government which was rejected by this Court in *Sanitary District* v. *United States*, 266 U. S. 405. That was a suit by the United States to enjoin the diversion of water from Lake Michigan through a canal into the Illinois River in amounts in excess of those authorized by the Secretary of War. Many years earlier, Congress had granted land to Illinois in aid of the construction of the canal. It was contended that the United States had invited and acquiesced in the construction of the canal to divert the water and was, therefore, estopped to deny the right to divert. 266 U. S. at 410. This Court rejected the contention, saying (p. 428):

> * * * if it [the land grant] has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan.

This Court went on to hold that the Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403, forbade any diversion not thereafter authorized by the Secretary of War.

Surely, the State of Illinois had a better right to rely upon its specific authorization to build the canal as a grant of a right to use the waters which the canal would carry than western water users have to rely upon general legislation which, in the case of the Act of 1866, applied to all areas where public lands were situated extending as far east as Ohio and, in the case of the Desert Land Act, was in terms limited to nonnavigable waters.

It is thus clear that the federal authority over navigable streams is no less in the western states than it is in the east. If anything, it is greater in the west since the United States there possesses not only the authority over navigable streams but also the powers attendant upon the fact that the lands were public domain of the United States and rights exist therein only to the extent they are granted by the Federal Government. The admission of the western states on an "equal footing" with the eastern states cannot, of course, mean that the navigation control is less in the west than it is in the east.

It is also asserted (Claimants' Br. 23) that the Government's argument would produce chaos in the western states because it denies the validity even among private citizens of water rights to navigable rivers. No such argument is advanced. In the west, as in the east, there are many benefits in the rivers which may be enjoyed, such as use thereof for the movement of boats, for taking fish, for building wharves, docks, etc., which do

not interfere with navigation. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69–70. Nor do we controvert the authority of the state to establish the rights of individuals to use the waters as against other private persons. We do contend that, as against the United States, such rights must give way to the superior governmental right or rather "that as against the Government such private interest is not a right at all." *United States* v. *Willow River Co.*, 324 U. S. 499, 510. Similarly, for many years, rights as between private persons to use the public domain and national forests for grazing purposes were recognized and local statutes relating thereto were given effect. *Buford* v. *Houtz*, 133 U. S. 320; *Omaechevarria* v. *Idaho*, 246 U. S. 343. But no vested rights as against the United States were created thereby. See *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523. And, in the Taylor Grazing Act, explicit provision was made as to the limitations under which the public domain could be used for such purposes. See *Brooks* v. *Dewar*, 313 U. S. 354. In *Osborne* v. *United States*, 145 F. 2d 892 (C. A. 9), many other examples were given of situations where a federal permit is valuable and the rights thereunder are protected between private parties but no vested right is acquired against the United States. Cf. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86.

CONCLUSION

In this supplemental brief we have pointed out that there has been no assumption of liability to respondents and that there has been no compensable taking within the meaning of the Fifth Amendment. The other issues in these cases have already been fully discussed in our main brief and our reply brief. We submit, therefore, that the judgments of the court below should be reversed with directions to dismiss the petitions.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,
A. DEVITT VANECH,
Assistant Attorney General,
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General,
ROGER P. MARQUIS,
RALPH S. BOYD,
Attorneys,
Department of Justice, Washington, D. C.

SEPTEMBER, 1949.

APPENDIX

MARCH 1, 1905.

The CHAIRMAN OF THE COMMITTEE ON
IRRIGATION OF ARID LANDS,
House of Representatives.

SIR: I am in receipt of your letter of the 18th ultimo, enclosing a copy of H. R. 17942, entitled "A Bill To authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming."

In response to your request that I inform your Committee as to the necessity and advisability, in my opinion, of passing the proposed legislation, I transmit herewith a copy of a letter of the 25th ultimo from the Director of the Geological Survey, in which, for reasons stated, he recommends that a favorable report be made on the bill.

Concurring in the Director's recommendation, I have the honor to recommend that the bill be enacted into law.

Very respectfully,

_____,
Secretary.

* * * * *

Irrigation in Montana and Wyoming.
(Report on H. R. 17942).

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, D. C., February 25, 1905.

The Honorable, the SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by Departmental reference, of a letter dated February 18 from Hon. F. W. Mondell, Chairman of the House Committee on Irrigation of Arid Lands, inclosing a copy and requesting a report upon H. R. 17942, "A Bill to authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming."

The bill is designed to authorize the Secretary of the Interior to construct a dam or other works in or along the Yellowstone and Missouri Rivers or their tributaries in Montana and Wyoming whenever it shall be necessary for the diversion of any part or all of the waters thereof for the purposes contemplated in the Reclamation Act.

This legislation is intended to overcome the technical objection to such works due to the fact that the said rivers are technically navigable and as such are embraced within the provisions of the River and Harbor Act of March 3, 1891 (30 Stat. 1121), which prohibits the placing of obstruction in navigable streams except by special authority of Congress. While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.

The waters of the streams in question are very valuable for irrigation works and numerous projects have already been surveyed and found feasible for the use of such water in irrigation. Used in this way they will render fertile hundreds of thousands of acres of land and add many millions of dollars to the resources of the country, while for navigation purposes the rivers are practically valueless.

It is informally understood that this is essentially the view taken by the engineers of the War Department who have not recently recommended any expenditure of money for improving or maintaining the navigation of these streams.

In view of these facts I have the honor to recommend that a favorable report upon the bill in question be made to the Committee on Irrigation of Arid Lands.

Very respectfully,

[S] ——— ———,

Director.

* * * * *

COMMITTEE ON IRRIGATION OF ARID LANDS,
HOUSE OF REPRESENTATIVES U. S.,
Washington, D. C., February 18, 1905.

The Honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith a copy of H. R. 17,942, "A Bill to authorize the Secretary of the Interior to construct irrigation works on certain streams in Montana and Wyoming," with a request, on behalf of the Committee on Irrigation of Arid Lands, of the House of Representatives, that you inform the Committee, at your earliest convenience, as to the neces-

sity and advisability, in your opinion, of passing the proposed legislation.

Very truly yours,

[S] ——— ———,
Chairman.

* * * * *

MARCH 1, 1905.

The CHAIRMAN OF THE COMMITTEE
ON IRRIGATION OF ARID LANDS,
House of Representatives.

SIR: With a letter of the 18th ultimo, you transmitted a copy of H. R. 18905, entitled

> A Bill To authorize the construction of irrigation works on the Yellowstone and Missouri Rivers in Montana and North Dakota, and permit the use of the waters of said rivers,

and requested that I inform your Committee as to the advisability and necessity, in my opinion, of passing the proposed legislation.

In reply, I transmit herewith a copy of a report of the 25th ultimo from the Director of the Geological Survey relative to the bill in which, for reasons stated, he recommends that the Department submit a favorable report.

The Director calls attention to the fact that this bill embodies substantially the same provisions as H. R. 17942, on which he reported also under date of February 25, 1905.

The Director's report on H. R. 17942 was transmitted to you by letter of even date recommending favorable action on the bill. I have the honor

to recommend, therefore, that the bill under consideration, H. R. 18905, be enacted into law.

Very respectfully,

_____,

Secretary.

* * * * *

Irrigation in Montana and Wyoming.
(Report on HR 18905).

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, D. C., February 25, 1905.

The Honorable the
SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by Departmental reference, of a letter dated February 18 from Hon. F. W. Mondell, Chairman of the House Committee on Irrigation of Arid Lands, inclosing a copy and requesting a report upon H. R. 18905, "A Bill to authorize the construction of irrigation works on the Yellowstone and Missouri rivers in Montana and North Dakota, and permit the use of the waters of said rivers."

The bill is designed to authorize the Secretary of the Interior to construct a dam or other works in or along the Yellowstone and Missouri rivers or their tributaries in Montana and North Dakota whenever it shall be necessary for the diversion of any part or all of the waters thereof for the purposes contemplated in the Reclamation Act.

This legislation is intended to overcome the technical objection to such works due to the fact that the said rivers are technically navigable and

as such are embraced within the provisions of the River and Harbor Act, March 3, 1891 (30 Stat. 1121). While it is possible at certain times of the year to navigate these streams with small craft, this navigation is in fact insignificant in value and seldom carried on.

The waters of the streams in question are very valuable for irrigation works and numerous projects have already been surveyed and found feasible for the use of such water in irrigation. Used in this way they will render fertile hundreds of thousands of acres of land and add many millions of dollars to the resources of the country, while for navigation purposes the rivers are practically valueless.

It is informally understood that this is essentially the view taken by the engineers of the War Department who have not recently recommended any expenditure of money for improving or maintaining the navigation of these streams.

The bill referred to embodies essentially the same provisions as H. R. 17942, a report upon which has been transmitted to the Department of even date herewith. It is believed that Bill H. R. 18905 is preferable to the other for the reason that it specifically mentions the State of North Dakota through which the Missouri River runs.

In view of these facts I have the honor to recommend that a favorable report upon the bill in question be made to the Committee on Irrigation of Arid Lands.

Very respectfully,

[S] ——— ———,

Director.

* * * * *

COMMITTEE ON IRRIGATION OF ARID LANDS,
HOUSE OF REPRESENTATIVES U. S.
Washington, D. C. February 18, 1905.

The Honorable the
SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith, on behalf of the Committee, a copy of H. R. 18905, "A Bill to authorize the construction of irrigation works on the Yellowstone and Missouri rivers in Montana and North Dakota, and permit the use of the waters of said rivers," with a request that, at your earliest convenience, you inform the Committee as to the advisability and necessity, in your opinion, of passing the proposed legislation.

Very respectfully,

[S] ——— ———,
Chairman.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948-'49

Nos. ~~299-304~~ 1 4 = 9

UNITED STATES OF AMERICA, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

UNITED STATES OF AMERICA, *Petitioner*
vs.
J. SHELDON POTTER

UNITED STATES OF AMERICA, *Petitioner*
vs.
MARTIN ERRECA

UNITED STATES OF AMERICA, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

UNITED STATES OF AMERICA, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Petition for Writs of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California,
Attorneys for Respondents.

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vs.

3-H SECURITIES COMPANY

On Petition for Writs of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW AND JURISDICTION.

These are adequately covered by the petition (p. 2).

STATEMENT OF THE CASE.

The petitioner's statement of the case is based on the claim that the Court of Claims disregarded the Congressional declarations that the Central Valley Project was in aid of navigation. Our answer is that the Court of Claims merely interpreted the Congressional declarations and held that they did not amount to declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation or flood control. On the contrary we claim that the Department of Justice has disregarded the Acts of Congress, the acts of the President, and of the Bureau of Reclamation, showing that the use was for private irrigation and that the taking in aid of it should be compensated for; and that Congress has in fact appropriated money for the payment of damages to the owners of the land involved in three of the cases at bar and of other lands. The petition is apparently filed pursuant to a contract between the Government and Miller & Lux Incorporated, the former owner of the land involved, by which the Government obligated itself to seek such a review irrespective of the correctness of the decree below. (Appendix p. xiv.) In the other three cases the Court of Claims merely applied the same rate of compensation fixed by

the Government in the three cases. The correctness of our contentions is shown by the following;

(1) The Central Valley Project consisted of the storage of the water of the *Sacramento River* and the use of it in aid of navigation on the Sacramento River and for irrigation and power, and the storage of the water of the *San Joaquin River* and the use of all of it for irrigation and made no provision for the use of any of the water of the San Joaquin River in aid of navigation (Appendix pp. iii, v, ix);

(2) The only Congressional declaration prior to the taking was that the *Central Valley Project* was in aid of navigation (50 Stats. 844, 850; 54 Stats. 1198);

(3) The Court of Claims on demurrer construed the Congressional declarations as applying to that part of the Plan that related to the water of the Sacramento River and not as declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation (*Gerlach v. U. S.*, 102 Ct. Cls. 392);

(4) The defendant in its answer set up no easement or other right of the Government in the water of the San Joaquin River (R., pp. 26, 52, 154, 160);

(5) The defendant on the trial offered no evidence that the storage or diversion of water of the San Joaquin River was in aid of navigation (R., pp. 103-104);

(6) The Plan was first formulated by the State of California and State Bulletin No. 25 stated:

"Dependence upon eminent domain offers the only certain expedient in dealing with the riparian objector";

(7) The Act of the Legislature of California regarding the Project (Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11) provided:

"In no other way than by purchase or otherwise as in this act provided shall said water rights as herein defined, of said watershed, area or the inhabitants be impaired or curtailed";

(8) The Supreme Court of California had held that the water of the San Joaquin River was used primarily for irrigation and the storage thereof was not in aid of navigation (*Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 (Certiorari Denied 271 U.S. 486));

(9) The United States Courts for California in *United States v. Central Stockholders*, 43 F.(2d) 977, 52 F.(2d) 322, had decided that storage on that river was not in aid of navigation;

(10) In House Document No. 332, 65th Congress, First Session, page 13,[1] it was stated in regard to the San Joaquin River:

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[1]In this brief we shall refer to many Governmental Reports, Plans, etc., which are not in the record as filed in this Court, except to the extent that they are recited in the findings. The Court takes judicial notice of such documents (*Jackson v. United States*, 230 U.S. 1, 18). We shall also refer to many official acts of the President, the Reclamation Bureau, or the Secretary of the Interior, which are not in the record as filed in this Court. Of these we likewise believe that the Court takes judicial notice (*Livermore v. Beal*, 18 C.A. (2d) 535, 540-1). We are attaching as an appendix a full

"It is believed that full use will be made for purposes of irrigation of all the water that can be so stored, and that no assistance to navigation can be expected from such sources.";

(11) In House Document No. 332, 65th Congress, First Session, paragraph 55, page 38, it was stated in regard to the San Joaquin River:

"the hope that better irrigation practices would make available more water for navigation use is futile.";

(12) House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, contained the report of Lytle Brown, Major General, Chief of Engineers, to the Secretary of War, in which it was stated:

"5. * * * *Further improvement above Stockton would require canalization, and the cost would be substantially in excess of the anticipated benefits.*" (p. 6).

"12. * * * *the Friant Reservoir would serve chiefly power development and irrigation.*" (p. 8).

"26. *The Friant project will not benefit navigation, and no Federal contribution to that project appears justified.*" (p. 13);

(13) In House Document No. 791, page 19, being the Report of Herbert Deakyne, Colonel, Corps of

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copy of the Plan of the Central Valley Project, which is in part recited in the findings, portions of the water right purchase agreement between the United States and Miller & Lux Incorporated and a letter from the Commissioner of the Reclamation Bureau stating the policy to make compensation.

Engineers, to the Chief Engineers, it was stated in paragraph 19:

> "The division engineer has considered the further improvement of the river above Stockton to Mendota, 175 miles. *He advises that because of the great need of water for irrigation it is impracticable to increase the low water flow by reservoirs sufficiently to provide a dependable channel for navigation.*";[2]

(14) The Plan itself expressly provided for compensating all persons having water rights on the San Joaquin River for the irrigation of cultivated lands, by exchanging their rights in the San Joaquin River for water brought to them by the Project from the Sacramento River, and expressly provided for the purchase or condemnation of all rights in the San Joaquin River for irrigation of uncultivated or grasslands (Appendix, pp. iii, v, viii);

(15) The Plan for the Central Valley Project was embodied in Rivers and Harbors Document Numbered 35, Seventy-third Congress (Appendix, p. i), and as we have pointed out provided for compensation for all water rights, and this Plan was expressly authorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), set forth on page 4 of the Petition for Writs of Certiorari herein.

(16) The Bureau of Reclamation immediately after the inauguration of the Plan entered into an exchange agreement with those having water rights

[2]Italics added in paragraphs 11-13.

for cultivated lands on the San Joaquin River aggregating over 1,000,000 acre feet of water[3] and also purchased from Miller & Lux Incorporated its water rights for uncultivated or grass lands for a price aggregating $2,450,000, all of which sum was paid by appropriations by Congress with the exception of amounts aggregating $511,350, which latter sum was paid from appropriations made by Congress into an escrow to be paid to Miller & Lux Incorporated, unless some other person should prove a better right thereto in some action commenced within six years after the initial storage at Friant Dam (R. 95-98);

(17) Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14, indicates that about $5,000,000 had been paid for water rights along the San Joaquin River by January 31, 1946, including $842,000 for the water rights of Chowchilla Lands, Inc. This does not

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[3]The 285,000 acres for which over 1,000,000 acre feet of water are to be exchanged (R. p. 93) all have water rights for cultivated lands. There is no evidence in the record of the value of those water rights, but the cost of the San Joaquin Pumping System which is designed to furnish a substituted water supply for the land, is $19,000,000. (Appendix p. vi.) This does not include any part of the cost of Kennett Dam, transmission line and substation estimated at $98,000,000 (Appendix p. vi) or the cost of perpetually maintaining the pumping system and carrying the water to the land, all of which are useful in creating the substituted water supply. All of this has been given by the Government in exchange for the water of San Joaquin River to which this land was entitled, and which the Government now claims it could have taken without compensation. On the other hand the amount awarded the plaintiffs in the cases at bar was only $94,355.26 of which $67,283.26 has already been paid by the Government into the escrow, leaving only $27,072 and interest to be paid by the Government.

include the 1,000,000 acre feet of water which is to be paid for by furnishing another water supply.[4]

(18) That the Government contemplated that the water rights would be compensated for is also indicated by the fact that the administration of the Project was transferred from the Corps of Engineers to the Bureau of Reclamation by the Act of December 5, 1924 (43 Stat. 702), and this brought the Project under Sections 7 and 8 of the Reclamation Act of 1902 (32 Stat. 388, 43 U.S.C., Sections 421, 383), which provide:

> "Sec. 421. Where in carrying out the provisions of this chapter it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Interior, under this chapter, to cause pro-

[4] These payments were made with the full knowledge of Congress. See eg. Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597; House Report 786, 75th Cong. 1st Sess. p. 15; Hearings before House Committee on Appropriations, pp. 281-282; Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291; House Report 1855, 75th Cong., 3rd Sess. p. 14; Hearings before House Committee on Appropriations, p. 349; Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685; House Report 161, 76th Cong. 1st Sess. p. 16; Hearings before House Committee on Appropriations, pp. 421-422; see, generally, Hearings before the House Committee on Appropriations, Interior Department, 74th Cong. 2nd Sess., pp. 179-181; Hearings before House Committee on Appropriations, Interior Department, 79 Cong. 1st Sess. p. 1200. See *Brooks v. Dewar*, 313 U.S. 354, 360-361.

ceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice." (43 U.S.C.A., Sec. 421.)

"Sec. 383. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (43 U.S.C.A., Sec. 383.)";

(19) The evidence showed that all the water of the San Joaquin River was taken by the Government for irrigation of non-riparian lands in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern, California (R. p. 90);

(20) In the document entitled "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, First Session, Central Valley Project of State Water Plan of California" held on February 7, 8 and 9, 1935, the following took place:

"Mr. Zimmerman. Is there any navigation at all on the San Joaquin River?" (p. 70)

"Mr. Hyatt. Not far above Stockton. There is really none on the river above tidewater." (p. 71)

* * * * * * *

"Mr. Wallgren. Would this money be expended to make the San Joaquin navigable?

Mr. Hyatt. No. We advanced that idea to the War Department but they deferred it. It is not in this plan.

Mr. Wallgren. The navigation feature in this bill applies to the Sacramento only?

Mr. Hyatt. Yes, sir." (p. 72)

(21) On the hearings on the Interior Department Appropriation Bill for 1938 the appropriation for the Central Valley Project was considered and in Part 2, page 1588, Mr. Hyatt (State Engineer of California), after sketching the purposes of the Kennett Dam on the Sacramento River, including the improvement of navigation on that River, stated:

"Another dam will be built on the San Joaquin River, right back of the city of Fresno. This is called the Friant Reservoir, and from that, large-sized canals will be built north and south, to serve the million acres which is in distress in the San Joaquin Valley.

The project involves the purchasing of water rights on second-class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land which is now being irrigated."

On page 1605, Representative Buck stated:

"Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water

rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of them have to be taken into consideration, and in many cases, both kinds of owners have to be compensated, in order to secure the rights for the Friant Dam and for the other reservoirs that may be built.

I am advised that those negotiations are practically at an end."

And on page 1616 Mr. Hyatt stated:

"I think, in actual cash, this amount will be required for payments to the contractors for the purchase of water rights and rights-of-way, before the end of the fiscal year 1938."

(22) Before the Dam was constructed the Commissioner of the Bureau of Reclamation gave written assurance to the landowners that

"The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam." (Appendix, p. xvi.)

(23) It appeared that the dam had been permanently closed on the 20th day of October, 1941, and 17,400 acre feet of water was permanently stored therein followed in 1944 by the storage of 302,600 acre feet and in 1945 by the storage of 430,000 acre feet (R., pp. 98-102);

(24) It appeared that the taking of October 20, 1941, depreciated the value of the property included

in the cases at bar $9.00 per acre (Findings 29, R., p. 88; 56, R., p. 110; 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127; 87, R., p. 128; 42, R., p. 188; 46, R., p. 190; and 49, R., p. 190).

THE FINDINGS.

The Court of Claims found:

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non-riparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California * * *" (Finding 32).
>
> "The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant." (Finding 32, R., p. 90.)

The Court of Claims also found that the water of the Sacramento River would be carried for 150 miles and lifted 160 feet in order to supply the crop lands theretofore irrigated from the San Joaquin River.

> "This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting *the entire flow* of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and

southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south." (R., pp. 91-2.)

The Court of Claims also found:

"Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills." (Finding 35, R., p. 94.)

The Court of Claims further found:

"Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

The plan contemplated that the grass land rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished." (Finding 35, R., pp. 94-95.)

The Court of Claims further found:

"the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grass-

land rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands." (Finding 37, R., pp. 95-96.)

PLAINTIFFS' CLAIMS.

Under these circumstances we submit that the taking of the water of the San Joaquin River for irrigation was not in aid of navigation, that even if such taking in any incidental manner aided navigation or flood control the United States had waived any sovereign immunity with respect to the taking of the water of the San Joaquin River and had agreed to make compensation to those having rights in such water, and that plaintiffs were entitled to recover the depreciation in the value of their lands, together with interest from October 20, 1941, until paid.

ARGUMENT.

I.

EVEN IF THE PROJECT WAS TO ANY EXTENT IN AID OF NAVIGATION OR FLOOD CONTROL, IT IS CLEAR FROM BOTH THE STATE AND FEDERAL HISTORY OF THE PROJECT AND THE TERMS OF THE PLAN ITSELF THAT CONGRESS DID NOT INTEND TO RELY UPON THAT FACT TO ENABLE IT TO DESTROY VESTED RIGHTS OF IRRIGATORS WITHOUT COMPENSATION, BUT ON THE CONTRARY EXPRESSLY PROVIDED FOR COMPENSATION TO THE IRRIGATORS OF BOTH CULTIVATED LANDS AND GRASS LANDS.

It is well settled that Congress had full power to waive and relinquish any immunity which the United States has to pay compensation due to the navigation

or flood control features of the Project. (*Henry Ford & Son v. Little Falls Fibre Company,* 280 U. S. 369.) That such immunity was waived is clear from the previous history of the Project, from the terms of the Plan, from the acts of the Department of the Interior making compensation, and the Acts of Congress approving the Plan and appropriating money from which payments were made.

The deliberate and ratifying action of Congress gives the force of law to the prior official action even if unauthorized when taken. (*Silas Mason Co. v. Tax Comm.,* 302 U. S. 186, 208.)

This is in line with the attitude of Congress expressed by Section 1(b) of the Flood Control Act of December 22, 1944, 58 Stat. 887, by which Congress expressly provided that the water rights of landowners in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act.

The same thing is shown by the action of Congress in transferring the Project to the Secretary of the Interior under the Reclamation Law, since under the Reclamation Act the Secretary "must obtain permits and priorities for the use of water from the State * * * in the same manner as a private appropriator or an irrigation district formed under the state law" (*Nebraska v. Wyoming,* 295 U. S. 40, 43).

Under Section 8 of the Act the Secretary is required to recognize all water rights under state law.

Under Section 7 of that Act he is required to make compensation for water taken for the Project. Why should the Secretary be criticized for doing so in view of the fact that an administrative agency created by Congress to carry on governmental activities are circumscribed by the authority granted by the Act or Acts of Congress pertaining thereto (*Montana-Dakota Utilities Co. v. Federal Power Com'n.*, 169 F. (2d) 392, 397.)

As we have already pointed out, the Plan authorized by Congress from its very inception provided for making compensation. With respect to three of the cases here involved the Government had contracted to pay Miller & Lux compensation and to pay from an escrow created by it compensation to anyone else showing a better right thereto. It had also paid Miller & Lux in cash close to $2,000,000 for damages to lands of the same type as the lands of plaintiffs. As to the other three cases the judgments merely apply to the lands involved therein the same rate of damages fixed by the government as to the other three cases. The Department of the Interior had made written declaration of the policy of the Government to make compensation.

The undisputed facts shown by the record are that the average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to the adoption of the Central Valley Project, 1,458,538 acre feet of this water had been acquired by prescriptive and appropriated rights by controlled irrigation (R., p. 84).

Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grasslands using three acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,705,138 acre feet of water, which is almost equal to the average annual flow of the River. The record shows that this water was used on 285,000 acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grasslands (Appendix p. viii), making a total area benefited amounting to 535,000 acres of land. The record further shows that the Plan contemplated that the water theretofore used on this acreage would be carried by the Madera Canal to 140,000 acres (Appendix, p. vi) and by the Kern Canal to 1,000,000 acres in the southern part of the Valley (Appendix, p. vi), making 1,140,000 acres to benefit by the water theretofore used by plaintiffs and other irrigators.

This area involved one of the largest irrigated areas in the world. Must it not be assumed that not only the owners of those water rights but the State and Federal Government were solicitous of the rights of that area and framed legislation to protect those rights in order that other areas might be developed? The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation. To now contend that no compensation is due because of

the relatively small, if any, effect on navigation or flood control, is to make a contention which Congress would not have countenanced and which it flatly repudiated.

II.

THE ACTS OF THE DEFENDANT IN CLOSING THE DAM AND IMPOUNDING 17,400 ACRE FEET OF WATER IN OCTOBER, 1941, CONSTITUTED A TAKING OF PLAINTIFFS' RIGHTS.

The findings on this subject are found in the record, pages 32 to 37. These acts clearly constituted a taking within the reasonable rule laid down by this Court in *United States v. Dickinson*, 331 U. S. 745. The Government clearly considered that this initial storage constituted a taking, because in its contract with Miller & Lux Incorporated it provided that actions must be brought "prior to the sixth anniversary after the initial storage or diversion of waters of the San Joaquin River by the United States by means of Friant Dam" (Appendix, p. viii).

The fact that both the Bureau and Miller & Lux Incorporated considered the "initial storage" on October 20, 1941, to constitute a taking, is clear from the finding that the contract only authorized deductions therein by the Government where they were authorized by actions commenced "prior to the sixth anniversary after the initial storage". (R., pp. 96-7). Obviously this referred to the six-year period allowed for suing under the Tucker Act. That period runs from the "taking". This definitely fixes the initial storage as the taking.

That the storage of this 17,400 acre feet of water constituted a taking is obvious in view of the fact that under the law of the State the storage of that quantity of water for a public purpose impressed the water of the river to the full capacity of the reservoir with that public use and deprived the plaintiffs of any right to recover the same.

Collier v. Merced Irrigation District, 213 Cal. 554.

III.

THE COURT WAS FULLY JUSTIFIED IN AWARDING INTEREST FROM OCTOBER 20, 1941, TO DATE OF PAYMENT.

The only objection to the allowance of interest is based on the fact that due to war conditions which commenced in December, 1941, the Government was unable to complete its Project and actually use all the water contemplated to be taken by the Project, although as we have already pointed out, it did store 17,400 acre feet in 1941, 302,600 acre feet in 1944 and 430,000 acre feet in 1945 (R., pp. 101-2). The taking in a legal sense being complete on October 20, 1941, the compensation is to be fixed as of that date, and the amount allowed as interest is not interest in the legal sense, but is compensation for delay, for which the Court allowed only 4%. It would be unendurable to have the compensation depend on the actual use rather than on the use which the condemnor was entitled to make. It is well settled that it must be assumed that the condemnor will make the use which

it is entitled to make to the extent most injurious to the landowners, and that damages must be fixed on that assumption.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

It should be noted that the contract by which the Bureau set up the escrow was dated July 27, 1939, and provided that Miller & Lux Incorporated should be entitled to interest from the date of the contract. In view of that fact the Government was not injured by an allowance of interest from October 20, 1941 (Appendix p. xv).

IV.

THE FINDINGS AS TO THE RIGHT TAKEN WERE SUFFICIENT.

The petitions alleged the riparian rights of plaintiffs and that the Plan was to take all of the water of the San Joaquin River flowing at Friant for the irrigation of non-riparian lands in certain specified counties (Par. VI, R., p. 2; Par. V, R., p. 19; Par. IV, R., p. 46; Par. V, R., p. 150; Par. IV, R, p. 155, and Par. V, R., p. 158). The Court found that that was what was taken (Finding 32, R., p. 90). The Court also found the depreciation which took place in the value of plaintiffs' land by this taking. (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56, 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128.) There was therefore no uncertainty as to the right taken.

V.

THE RULING OF THE COURT OF CLAIMS THAT THE CALIFORNIA CONSTITUTIONAL AMENDMENT IN NO WAY DEPRIVED THE PLAINTIFFS OF THEIR RIGHT TO COMPENSATION FOR DEPRECIATION IN VALUE OF THEIR LAND BY THE TAKING OF ALL THE WATER OF THE RIVER, WAS FULLY JUSTIFIED.

While the contrary contention is not relied upon by petitioner as a ground for the issuance of the writs, we deem it proper to call to the attention of the Court that the Supreme Court of California has held that Constitutional Amendment to be no bar to recovery by plaintiffs.

Hillside Water Company v. City of Los Angeles, 10 Cal. (2d) 677, 76 P. (2d) 681;

City of Lodi v. East Bay Municipal Utility District, 7 Cal. (2d) 316, 60 P. (2d) 439;

City of Los Angeles v. Aitken, 10 C. A. (2d) 460, 52 P. (2d) 585;

Los Angeles County Flood Control District v. Abbot, 24 C. A. (2d) 728, 76 P. (2d) 188;

Meridian Ltd. v. The City and County of San Francisco, 13 Cal. (2d) 424, 90 P. (2d) 537;

City of Elsinore v. Temescal Water Company, 36 C. A. (2d) 116, 97 P. (2d) 274;

Williams v. City and County of San Francisco, 24 C. A. (2d) 630, 76 P. (2d) 182.

In the cases at bar the defendant had full opportunity to develop what was a reasonable method for the watering of grasslands and to have the value of the lands with and without water fixed accordingly. Whether or not it did so is not material on this ap-

peal, where there is no error relied upon as to the admission of evidence respecting the basis for fixing the damages.

In the petitions plaintiffs alleged that they were entitled to all the rights of riparian owners. The Court takes judicial notice of what those rights are, and no allegation or finding thereof was necessary. Whatever limitation the Constitutional Amendment made upon riparian rights theretofore recognized in the state is implicit in the finding that the damage was caused by the taking of the riparian rights of the plaintiffs (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56-7, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128).

CONCLUSION.

It should be noted that in the three cases at bar covered by the Miller & Lux contract it is expressly provided that the Government must take an appeal entirely irrespective of the merits of the appeal unless an appeal is waived by Miller & Lux Incorporated. (See Appendix, p. xiv.) The cases would seem to present a situation where the Government acting through Congress recognized the justness of making compensation where water was taken away from land of a certain type in the northern portion of the San Joaquin Valley for the irrigation of another type of land in the southern part of the San Joaquin Valley. It actually made such compensation to the extent of $2,450,000 to Miller & Lux Incorporated, and in effect

agreed that if these judgments had not been rendered the part thereof held in escrow would likewise be paid to Miller & Lux. The Government now through the Solicitor General makes the claim that no compensation need be made to the plaintiffs or to any other person for taking away their water rights. This is most extraordinary in view of the further fact that the Government has also promised to pay to Miller & Lux and its subsidiary canal companies for 1,000,000 acre feet of water used for cultivated lands by delivering to them water carried 150 miles from the Sacramento River and raised 160 feet. All of this inconsistency is for the purpose of preventing the Government from paying $9.00 an acre to the plaintiffs, rather than $9.00 an acre to Miller & Lux Incorporated. We realize that this brief is longer than we would like, but we justify it on account of the duty we feel we owe, not only to the plaintiffs, but to all water right owners who have relied upon the assurance of the Government that they would be compensated.

We respectfully submit that the writs should be denied.

Dated, San Francisco, California,
November 8, 1948.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondents.

(Appendix Follows.)

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A.

PLAN OF THE CENTRAL VALLEY PROJECT EMBODIED IN RIVERS AND HARBORS DOCUMENT NUMBERED 35, SEVENTY-THIRD CONGRESS AUTHORIZED BY SECTION 2 OF THE RIVERS & HARBORS ACT OF AUGUST 26, 1937 (50 STAT. 844, 850), SET FORTH ON PAGE 4 OF THE PETITION FOR WRITS OF CERTIORARI HEREIN.

The Secretary of the Interior

Washington

November 26, 1935

The President,

The White House.

My dear Mr. President:

The Supreme Court of the United States in the Parker Dam decision (United States v. State of Arizona, 295 U.S. 174) indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall be undertaken unless and until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702), provides as follows:

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

General Description of Project.

The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 90,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will

regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply.

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features.

The principal engineering features of the project are as follows:

Kennett Dam Unit—The Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch on Suisun Bay.

Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir—A dam, 250 feet high, will be be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett dam, reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
Total	$170,000,000

First Year Construction Program.

Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

Kennett Reservoir Unit Contra Costa Conduit
Friant Dam and Canals.

An amount of $15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

Adaptability of Land for Irrigation, Crop Production and Settlement.

The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts, and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus, are produced almost wholly in California.

Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of

a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

Social and Economic Values.

The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up, but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants

produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

Probable Return to Reclamation Fund Of Cost of Construction.

The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, includ-

ing repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

Sincerely yours,
(Sgd.) Harold L. Ickes,
Secretary of the Interior.

Approved: Dec. 2, 1935.
Franklin D. Roosevelt,
President.

B.

PORTIONS OF CONTRACT FOR PURCHASE OF MILLER & LUX WATER RIGHTS DATED JULY 27, 1939.

"Payment of Purchase Price and Conveyance of Properties.

"13. The Vendors shall, within fifteen (15) days after notice of the execution of this contract by the United States, execute and deliver to the United States a deed, in the form annexed hereto and marked Exhibit "A", duly executed and acknowledged by the Vendors, conveying to the United States all of the property and property rights herein agreed to be conveyed, together with a deed of reconveyance from The Bank of California, N. A., as Trustee, wherein and whereby said Trustee shall reconvey to Miller & Lux, Incorporated, a corporation, all of the water rights, or rights to the use of water, and other rights or properties, herein agreed to be transferred and conveyed to the United States, free and clear of the lien of that certain Trust Indenture dated the first day of October, 1925, wherein Miller & Lux, Incorporated was Trustor and the said The Bank of California, N. A. was Trustee. The United States shall purchase said water rights, or rights to the use of water, and other rights and properties herein agreed to be conveyed on the terms herein expressed, and upon execution and delivery of said deed and said deed of reconveyance, it shall cause to be paid to the Vendors as full purchase price and full payment for all damages for taking possession of said rights and for entry upon said property, and damages resulting from the construction,

operation and maintenance of said Friant Dam and other works to utilize such rights, the sum of two million, four hundred and fifty thousand dollars ($2,450,000.00), of which sum $1,938,650.00 shall be paid to Vendors and $511,350.00 thereof shall be deposited in escrow, within the period as hereinafter in Subdivision (e) of Article 14 of this contract provided."

* * * * * * *

"(e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to-wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.

"There is delivered herewith to each of the parties hereto, and as part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "Bureau of Reclamation, United States Department of the Interior, Central Valley Project—Map showing grass lands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands

in this contract referred to as "Grass Lands" and as "Riparian Lands". The boundaries of said Grass Lands are outlined in green and the boundaries of the Riparian Lands are outined in orange. Said map need not be recorded.

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B", are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B", are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall

be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; provided, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"IT IS AGREED AND UNDERSTOOD that there shall be no payment out of said escrow as the result of final judgments or decrees entered by the consent of the United States, or as the result of failure by the United States to defend said actions or to appeal said actions, unless said judgments or decrees are entered or permitted to be entered with the consent of the Vendors.

"No part of the escrow fund herein provided for shall be used to pay costs, expenses, or attorneys' fees incurred in defense of said suits and actions referred to in this subdivision (e) of Article 14, it being understood and agreed that the United States and Vendors shall each pay its costs, expenses and attorneys' fees, if any, incurred in said litigation.

"Payment out of the escrow shall be made annually at or within thirty days after the end of each calendar year, each payment to cover all final judgments or decrees as above described entered during each said year. Payment shall be made by the delivery by the escrow agent to the Secretary of the Interior, or his

authorized representative, of securities equal to the amount then owing to the United States, or as near thereto as possible considering the basic units of the securities in escrow. For this purpose, securities delivered shall be valued at the current market values thereof.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities.

"Interest accrued on securities remaining in escrow on any interest maturity date shall become the property of the Vendors, and the escrow agent shall at such times deliver the matured coupons to the Vendors. The costs of the escrow shall be borne by the Vendors.

"The escrow agent shall reinvest the principal of escrowed securities that mature or are retired during the life of the escrow, in such Federal securities as are designated by the parties hereto."

C.

United States
Department of the Interior
Bureau of Reclamation
Washington

June 22, 1939

Office of the Commissioner
Mr. Walker R. Young,
Supervising Engineer, U. S. Bureau of Reclamation,
Old Post Office Building,
Sacramento, California.

Dear Mr. Young:

It has come to my attention that there has been some apprehension among landowners along the San Joaquin River between Friant and Gravelly Ford concerning the effect upon their lands through construction of Friant Dam.

The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam.

The investigations now being made by the Bureau of Reclamation are intended to determine the effect Friant Dam will have on these properties in order that damages may be ascertained and compensation made before such damages actually occur.

You may assure the landowners that if and when our investigations determine the extent to which their

property rights will be invaded, appropriate action will be taken.

Very truly yours,
(Sgd.) John C. Page
Commissioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1918~~ 1919

Nos. ~~299-304~~ 4 — 7

THE UNITED STATES, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

THE UNITED STATES, *Petitioner*
vs.
J. SHELDON POTTER

THE UNITED STATES, *Petitioner*
vs.
MARTIN ERRECA

THE UNITED STATES, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

THE UNITED STATES, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

THE UNITED STATES, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California
Attorneys for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NOS. 299-304

THE UNITED STATES, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

THE UNITED STATES, *Petitioner*
vs.
J. SHELDON POTTER

THE UNITED STATES, *Petitioner*
vs.
MARTIN ERRECA

THE UNITED STATES, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

THE UNITED STATES, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

THE UNITED STATES, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

OPINION BELOW AND JURISDICTION.

These are adequately covered by the petition (p. 2).

STATEMENT OF THE CASES.

The average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to any of the proceedings of the government involved in these cases, 1,458,538 acre feet of this water had been utilized by controlled irrigation (R., p. 84). Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grass lands, using 3 acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,704,538 acre feet of water, which is almost equal to the average annual flow of the river. The record further shows that this water was used on 285,000 acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grass lands (Appendix, p. viii), making a total yearly benefit to 535,000 acres of land. Prior to any of the proceedings by the government herein Madera Irrigation District, a public body under the laws of California, filed applications for the appropriation of large amounts of water from the San Joaquin River to be stored at a *point known as Friant, and to be used for the irrigation* of land in Madera County. In connection with this matter, litigation arose between that District and Miller & Lux Incorporated and other corporations owning land riparian to the river and appropriations from the river, in which a decree was entered on January 4, 1933, adjudging the riparian character of the lands of Miller & Lux Incorporated, including the lands of the plaintiffs in the Gerlach, Potter and Erreca cases, that the waters of the river overflowed and percolated into the land, that the high and flood flows of the river in the winter, spring and summer,

were highly beneficial for the production of grass and pasture, and that all of the water of the river, including the high and flood flow in the winter, spring and summer, was part of the natural and ordinary flow of the river to which Miller & Lux Incorporated was entitled, with the exception of flows in excess of 20,000 second feet at any one time, or in excess of 3,000,000 acre feet in any one year, and that flows in excess of those amounts are infrequent, extraordinary and unusual and not a part of the regular and customary flow of the water of the river; that the appropriation by the Madera Irrigation District was invalid and ineffective as against the rights of Miller & Lux; and the landowners were entitled to the full flow of the stream for the purpose of fertilizing and irrigating the lands, except with respect to flows in excess of 20,000 second feet at any one time, or in excess of 3,000,000 acre feet in any one year, (R., Finding 17, pp. 79-81).

It should be noted that the above-named plaintiffs are successors in interest of Miller & Lux with respect to the land in question and the United States of America is successor in interest of Madera Irrigation District (R., pp. 78-9).

Each of the actions here involved is to recover compensation for the taking by the government of all of the water of the San Joaquin River flowing at Friant above the lands of plaintiffs for the irrigation of privately-owned non-riparian lands in Madera, Fresno, Tulare, Kings and Kern Counties, California. Each petition alleges that that is the plan of the District,

and further alleges that the plan had been so far carried out that on the 20th day of October, 1941, the government began the storage of the water of the river and at that time took all of the riparian rights of the plaintiffs (R., pp. 1, 37, 43, 148, 154 and 157). It will be noted that what the plaintiffs are suing for is the taking of plaintiffs' rights to water their lands riparian to the river in order to water other lands not riparian to the river.

The central portion of California is composed of two valleys, one the Sacramento Valley traversed by the Sacramento River system flowing south to San Francisco Bay, and the San Joaquin Valley traversed by the San Joaquin River system flowing northerly into the San Francisco Bay. These combined valleys are referred to as the Central Valley of California (R. 71). The United States in 1935 approved a plan to be carried out by the Reclamation Bureau for the utilization of the waters of these streams in the following manner: The basic principle of the plan was that there was more water in the Sacramento Valley than was needed for the irrigation of the land in that valley, and insufficient water in the San Joaquin Valley for the irrigation of land in that valley. It was therefore planned that a reservoir should be constructed in the upper reaches of the Sacramento Valley to store the water of the Sacramento River, to be known as Shasta Dam, and to use that water for three purposes: (1) The production of power which could be used to raise the water into the San Joaquin Valley; (2) to furnish a supply of water at the junc-

tion of the Sacramento River and Carquinez Straits so as to prevent incursion of salt water into the delta of the Sacramento and San Joaquin Rivers; and (3) to supply water which could be pumped up the San Joaquin River to supply the *cultivated* lands in the San Joaquin Valley which would be deprived of the water of the San Joaquin River. It was also planned to construct a reservoir in the San Joaquin Valley in the upper reaches of the San Joaquin River at a point known as Friant, at which point all the water of the San Joaquin River there flowing would be reservoired and diverted through two canals, one known as the Madera Canal and flowing northerly, and another known as the Kern Canal and flowing southerly, to be used on land non-riparian to the San Joaquin River. This plan was approved by the President on the 2nd day of December, 1935 (R., p. 91; Supp. p. i). The plan further contemplated that all of the *cultivated* lands theretofore irrigated by the waters of the San Joaquin River would thereafter be irrigated by waters pumped from the Sacramento Valley and that arrangements would be made with the owners of such land for such exchange of waters. So far as the *uncultivated grass* lands theretofore watered by the waters of the San Joaquin River were concerned, their irrigation was to be discontinued and the government was to purchase or otherwise acquire the rights of such lands in the water of the San Joaquin River (R. pp. 94-5).

While this plan is set forth in considerable detail in the findings, the complete plan is not therein set

forth, and as we deem it a document of which the Court takes judicial notice, we have attached the full plan in an appendix hereto (Appendix, p. i).

The Bureau of Reclamation immediately proceeded to purchase under contracts with the grass land owners their rights in the river and to compensate them for the taking of the water (R. pp. 95-8). One of the largest grass land owners was Miller & Lux Incorporated, which owned, either in its own name or through subsidiary corporations many thousands of acres of crop or cultivated lands and grass lands. The government entered into two contracts with Miller & Lux Incorporated, one providing for the acquisition by the government of all of the rights of that Company and its subsidiaries to water from the San Joaquin River, in exchange for an agreement to furnish them with a like quantity of water from the Sacramento River, and providing for furnishing to them from the San Joaquin River water for the crop lands until the government was able to deliver water from the Sacramento River, and agreeing to pay Miller & Lux $2,450,000 for depriving their grass lands of the water of the San Joaquin River. These grass lands were of two types, one type irrigated by controlled flows, and one type watered by uncontrolled flows of the river and its channels. This $2,450,000 was arrived at by allowing $13.00 an acre for the land subject to controlled flows and $9.00 an acre for land subject to uncontrolled flows (R. p. 97).

All of the lands of plaintiffs Potter, Erreca and Gerlach Live Stock Company were covered by this

contract, but the contract provided that money applicable to this land should be deposited in escrow and paid to Miller & Lux Incorporated six years after the first diversion of water unless before that time action had been instituted by others in the Court of Claims of the United States for such compensation (R. pp. 96-7).

Prior to that time Miller & Lux Incorporated had deeded the land involved in Potter case No. 46245 to Potter (R. pp. 104-10) and the land involved in Gerlach case No. 46009 to Gerlach Live Stock Company (R. pp. 125-8) and had entered into written contracts for the sale of the land involved in Erreca case No. 46244 to Martin Erreca (R. pp. 111-13). These deeds and contracts of sale all recognized that the riparian rights of these lands were conveyed with the land, subject, however, to certain vested rights of Miller & Lux Incorporated and its subsidiary corporations, which were protected by certain exceptions, reservations and conditions.

In the three cases of James J. Stevinson, a corporation, Archibald J. Stevinson and 3-H Securities Company, the plaintiffs were the owners of riparian lands near the junction of the San Joaquin River and the Merced River. The Court held that all this land was riparian, and in fixing the damages the Court used the same $9.00 an acre unit value applied in the Miller & Lux contract to uncontrolled overflow lands (R. pp. 185-91).

The owner of these lands, James J. Stevinson, a corporation, had entered into contracts by which its

riparian rights were preserved, but the rights of the land were subordinated to certain specified rights of Miller & Lux Incorporated and its subsidiary corporations. The lands, therefore, involved in these cases were, like the lands acquired from Miller & Lux Incorporated, only entitled to the surplus water after the superior rights were supplied (R. pp. 163-8).

NAVIGATION.

The government by demurrer raised the contention that the Central Valley Project was also in aid of navigation and that therefore plaintiffs could not recover compensation. The Court of Claims, in overruling this demurrer, held that there was no governmental declaration that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation, and that it was obvious that to completely dry up the river could not be in aid of navigation. The defendant in its answer, did not make any contention that the taking of the water for the purpose alleged in the petition was in aid of navigation, nor did it on the trial introduce any evidence to that effect (R. pp. 103-4).

FINDINGS.

The petitioner has not brought up the evidence in the cases, so the cases are entirely controlled by the findings. The Court of Claims, among other things, found:

1. "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California * * *" (Finding 32, R. p. 90).

2. "The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant." (Finding 32, R. p. 91).

3. The water of the Sacramento River would be carried for 150 miles and lifted 150 feet in order to supply the crop lands theretofore irrigated on the San Joaquin River, and that "This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting *the entire flow* of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the Project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south" (R. pp. 91-2).

4. "Defendant's Plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the wat-

ers of the San Joaquin River flowing at Friant, except for occasional spills" (Finding 35, R. p. 94).

5. "Defendant's Plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights" (Finding 35, R. pp. 94-5).

6. "The Plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished" (Finding 35, R. p. 95).

7. "the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grassland rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands" (Finding 37, R. pp. 95-96).

8. That the plaintiffs' lands were regularly overflowed by the waters of the San Joaquin River and that this overflow was beneficial (R. p. 71).

9. That this overflow was ordinary and usual (R. p. 72).

10. That the value of the riparian lands depends, among other factors, on the quantity of such overflow (R. p. 84).

11. That this overflow water was part of the regular and natural flow of the stream (R. p. 172).

12. That while some of this water flowed past the lands of the plaintiffs and the surplus goes eventually to the San Francisco Bay, it was useful in preventing the encroachment of salt water into the San Joaquin delta (R. p. 88).

13. That the use of 3 acre feet per acre by overflow was a reasonable use (R. p. 88).

14. That the overflow water affects the market value of the land (R. p. 88).

15. That there were water rights on the river of an undefined character below the lands of plaintiffs (R. p. 88).

16. That the government Plan was to take all the water of the river (R. p. 90).

17. That the water taken by the government was to be used for irrigation (R. p. 92).

18. That it was the Plan of the government to give a substituted supply of water of a million acre feet of water for 285,000 acres of cultivated lands (R. p. 93).

19. This overflow increased the grasses on the land (R. p. 87).

20. That the Plan contemplated that water for 250,000 acres of submarginal lands should be purchased (R. p. 93).

21. That all the water to be taken by the government was to be taken for non-riparian lands (R. p. 94).

22. That the government was to acquire all rights to water on the river (R. p. 94).

23. That the plan contemplated a substituted supply for crop lands (R. p. 94).

24. The plan contemplated that grass land rights and riparian rights should be purchased or otherwise acquired and the riparian rights extinguished (R. p. 95).

25. No evidence was introduced of any improvement to navigation of the San Joaquin River by the Project. On the contrary, it appeared that in thirty-six years out of forty-eight years the Project would dry up the river (R. p. 103).

26. The amounts awarded to the plaintiffs were the differences between the value of the overflowed lands with and without their riparian rights (R. pp. 110, 113, 128, 188 and 190-1).

ARGUMENT.

I.

THE PRIMARY PURPOSE OF THE FRIANT DAM AND CANALS LEADING THEREFROM IS THE IRRIGATION OF PRIVATELY OWNED NON-RIPARIAN LANDS, AND IT HAS NO SUBSTANTIAL EFFECT ON NAVIGATION OR FLOOD CONTROL.

It is obvious from a reading of the Plan itself that there was no intent to construct Friant dam for any

purpose other than for the irrigation of lands in the southern portion of the San Joaquin Valley. That is what the Government said by the Plan it was to do and that was in no way changed up to the time of the taking, which became the basis of these actions. Later, apparently, it was suggested that the dam might be operated so there would be "occasional spills". The record is not clear as to what is meant by "occasional spills" as having any relation to flood control; but we assume in favor of the Government that it means that at certain times the reservoir might be filled to capacity, possibly in the winter, and in order to take care of later floods some water might be permitted to spill out of the reservoir so as to leave room for storage of later floods, and thus affect flood control. The fact still remains, however, that the Government, under its Plan, had already acquired the right to take all of the water out of the river for the benefit of irrigation. It has not waived that right or obligated itself not to use all the water for that purpose, and the mere statement of an intent to make occasional spills cannot affect the right of the plaintiffs to compensation for the thing that was taken from them.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

The correctness of our contention that there is no substantial aid to navigation or flood control, so far as the San Joaquin River is concerned, is shown by the following:

(1) The Central Valley Project consisted of the storage of the water of the *Sacramento River* and the use of it in aid of navigation on the Sacramento River and for irrigation and power, and the storage of the water of the *San Joaquin River* and the use of all of it for irrigation and made no provision for the use of any of the water of the San Joaquin River in aid of navigation (Appendix pp. iii, v, ix);

(2) The only Congressional declaration prior to the taking was that the *Central Valley Project* was in aid of navigation (50 Stats. 844, 850; 54 Stats. 1198);

(3) The Court of Claims on demurrer construed the Congressional declarations as applying to that part of the Plan that related to the water of the Sacramento River and not as declarations that the taking of all the water of the San Joaquin River for irrigation was in aid of navigation (*Gerlach v. U. S.*, 102 Ct. Cls. 392);

(4) The defendant in its answer set up no easement or other right of the Government in the water of the San Joaquin River (R., pp. 26, 52, 154, 160);

(5) The defendant on the trial offered no evidence that the storage or diversion of water of the San Joaquin River was in aid of navigation (R., pp. 103-104);

(6) The Plan was first formulated by the State of California and State Bulletin No. 25 stated:

> "Dependence upon eminent domain offers the only certain expedient in dealing with the riparian objector";

(7) The Act of the Legislature of California regarding the Project (Stats. Cal. 1933, p. 2643 at p. 2651, Sec. 11) provided:

> "In no other way than by purchase or otherwise as in this act provided shall said water rights as herein defined, of said watershed, area or the inhabitants be impaired or curtailed";

(8) The Supreme Court of California had held that the water of the San Joaquin River was used primarily for irrigation and the storage thereof was not in aid of navigation (*Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 (Certiorari Dismissed 275 U.S. 486));

(9) The United States Courts for California in *United States v. Central Stockholders*, 43 F. (2d) 977, 52 F. (2d) 322, had decided that storage on that river was not in aid of navigation;

(10) In House Document No. 332, 65th Congress, First Session, page 13,[1] it was stated in regard to the San Joaquin River:

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[1]In this brief we shall refer to many Governmental Reports, Plans, etc., which are not in the record as filed in this Court, except to the extent that they are recited in the findings. The Court takes judicial notice of such documents (*Jackson v. United States*, 230 U.S. 1, 18). We shall also refer to many official acts of the President, the Reclamation Bureau, or the Secretary of the Interior, which are not in the record as filed in this Court. Of these we likewise believe that the Court takes judicial notice (*Livermore v. Beal*, 18 C.A. (2d) 535, 540-1). We are attaching as an appendix a full copy of the Plan of the Central Valley Project, which is in part recited in the findings, portions of the water right purchase agreement between the United States and Miller & Lux Incorporated and a letter from the Commissioner of the Reclamation Bureau stating the policy to make compensation.

"It is believed that full use will be made for purposes of irrigation of all the water that can be so stored, and that no assistance to navigation can be expected from such sources.";

(11) In House Document No. 332, 65th Congress, First Session, paragraph 55, page 38, it was stated in regard to the San Joaquin River:

"the hope that better irrigation practices would make available more water for navigation use is futile.";

(12) House Document No. 791, 71st Congress, Third Session, dated February 27, 1931, contained the report of Lytle Brown, Major General, Chief of Engineers, to the Secretary of War, in which it was stated:

"5. * * * *Further improvement above Stockton would require canalization, and the cost would be substantially in excess of the anticipated benefits.*" (p. 6).

"12. * * * *the Friant Reservoir would serve chiefly power development and irrigation.*" (p. 8).

"26. *The Friant project will not benefit navigation, and no Federal contribution to that project appears justified.*" (p. 13);

(13) In House Document No. 791, page 19, being the Report of Herbert Deakyne, Colonel, Corps of Engineers, to the Chief Engineers, it was stated in paragraph 19:

"The division engineer has considered the further improvement of the river above Stockton to Mendota, 175 miles. *He advises that because of*

the great need of water for irrigation it is impracticable to increase the low water flow by reservoirs sufficiently to provide a dependable channel for navigation.";[2]

(14) The Plan itself expressly provided for compensating all persons having water rights on the San Joaquin River for the irrigation of cultivated lands, by exchanging their rights in the San Joaquin River for water brought to them by the Project from the Sacramento River, and expressly provided for the purchase or condemnation of all rights in the San Joaquin River for irrigation of uncultivated or grasslands (Appendix, pp. iii, v, viii);

(15) The Plan for the Central Valley Project was embodied in Rivers and Harbors Document Numbered 35, Seventy-third Congress (Appendix, p. i), and as we have pointed out provided for compensation for all water rights, and this Plan was expressly authorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), set forth on page 4 of the Petition for Writs of Certiorari herein.

(16) The Bureau of Reclamation immediately after the inauguration of the Plan entered into an exchange agreement with those having water rights for cultivated lands on the San Joaquin River aggregating over 1,000,000 acre feet of water[3] and also

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[2]Italics added in paragraphs 11-13.

[3]The 285,000 acres for which over 1,000,000 acre feet of water are to be exchanged (R. p. 93) all have water rights for cultivated lands. There is no evidence in the record of the value of those water rights, but the cost of the San Joaquin Pumping System which is designed to furnish a substituted water supply for the land, is

purchased from Miller & Lux Incorporated its water rights for uncultivated or grass lands for a price aggregating $2,450,000, all of which sum was paid by appropriations by Congress with the exception of amounts aggregating $511,350, which latter sum was paid from appropriations made by Congress into an escrow to be paid to Miller & Lux Incorporated, unless some other person should prove a better right thereto in some action commenced within six years after the initial storage at Friant Dam (R. 95-98);

(17) Feasibility Report, H. Doc. 146, 80th Cong., 1st Sess., pp. 12, 14, indicates that about $5,000,000 had been paid for water rights along the San Joaquin River by January 31, 1946, including $842,000 for the water rights of Chowchilla Lands, Inc. This does not include the 1,000,000 acre feet of water which is to be paid for by furnishing another water supply.[4]

$19,000,000. (Appendix p. vi.) This does not include any part of the cost of Kennett Dam, transmission line and substation estimated at $98,000,000 (Appendix p. vi) or the cost of perpetually maintaining the pumping system and carrying the water to the land, all of which are useful in creating the substituted water supply. All of this has been given by the Government in exchange for the water of San Joaquin River to which this land was entitled, and which the Government now claims it could have taken without compensation. On the other hand the amount awarded the plaintiffs in the cases at bar was only $94,355.26 of which $67,283.26 has already been paid by the Government into the escrow, leaving only $27,072 and interest to be paid by the Government.

[4]These payments were made with the full knowledge of Congress. See eg. Interior Department Appropriation Act for fiscal year 1938, 50 Stat. 597; House Report 786, 75th Cong. 1st Sess. p. 15; Hearings before House Committee on Appropriations, pp. 281-282; Interior Department Appropriation Act for fiscal year 1939, 52 Stat. 291; House Report 1855, 75th Cong., 3rd Sess. p. 14; Hearings before House Committee on Appropriations, p. 349; Interior Department Appropriation Act for fiscal year 1940, 53 Stat. 685; House Report 161, 76th Cong. 1st Sess. p. 16; Hearings before

(18) The evidence showed that all the water of the San Joaquin River was taken by the Government for irrigation of non-riparian lands in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern, California (R., p. 90);

(19) In the document entitled "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, First Session, Central Valley Project of State Water Plan of California" held on February 7, 8 and 9, 1935, the following took place:

> "Mr. Zimmerman. Is there any navigation at all on the San Joaquin River?" (p. 70)
>
> "Mr. Hyatt. Not far above Stockton. There is really none on the river above tidewater." (p. 71)
>
> * * * * * * *
>
> "Mr. Wallgren. Would this money be expended to make the San Joaquin navigable?
>
> Mr. Hyatt. No. We advanced that idea to the War Department but they deferred it. It is not in this plan.
>
> Mr. Wallgren. The navigation feature in this bill applies to the Sacramento only?
>
> Mr. Hyatt. Yes, sir." (p. 72)

(20) On the hearings on the Interior Department Appropriation Bill for 1938 the appropriation for the Central Valley Project was considered and in Part 2,

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House Committee on Appropriations, pp. 421-422; see generally, Hearings before the House Committee on Appropriations, Interior Department, 74th Cong. 2nd Sess., pp. 179-181; Hearings before House Committee on Appropriations, Interior Department, 79 Cong. 1st Sess. p. 1200. See *Brooks v. Dewar*, 313 U.S. 354, 360-361.

page 1588, Mr. Hyatt (State Engineer of California), after sketching the purposes of the Kennett Dam on the Sacramento River, including the improvement of navigation on that River, stated:

> "Another dam will be built on the San Joaquin River, right back of the city of Fresno. This is called the Friant Reservoir, and from that, large-sized canals will be built north and south, to serve the million acres which is in distress in the San Joaquin Valley.
>
> The project involves the purchasing of water rights on second-class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land which is now being irrigated."

On page 1605, Representative Buck stated:

> "Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of them have to be taken into consideration, and in many cases, both kinds of owners have to be compensated, in order to secure the rights for the Friant Dam and for the other reservoirs that may be built.
>
> I am advised that those negotiations are practically at an end."

And on page 1616 Mr. Hyatt stated:

> "I think, in actual cash, this amount will be required for payments to the contractors for the

purchase of water rights and rights-of-way, before the end of the fiscal year 1938."

(21) Before the Dam was constructed the Commissioner of the Bureau of Reclamation gave written assurance to the landowners that

> "The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam." (Appendix, p. xvi.)

As we pointed out, the original Plan made no reference to navigation or flood control so far as Friant Dam was concerned. However, the Court found that there had been a modification of the Plan so as to divert all the water to non-riparian lands "except for occasional spills". In other words, it was thought that at times it might be wise to spill water over the Dam so as to leave room for subsequent floods (R., p. 94). This matter was entirely immaterial because we are suing for the right acquired by the defendant to divert all of the water for irrigation of non-riparian lands. Such diversion is obviously entirely disconnected from any aid to navigation or flood control. The gravamen of the action is the storage and diversion of all the water of the river for the irrigation of non-riparian lands. *Such* storage and *such* diversion were in no way in aid of navigation. The Court found that the occasional spills did not constitute an irrigation supply for plaintiffs and the damages to plaintiffs were fixed after giving due consideration to this spill (R., p. 94). It is probable that this modification

was the cause for the statement in H. Com. on Flood Control, Doc. No. 2, 78th Cong., 2d Sess., that part of the cost of Friant may be charged to flood control, but stating that its primary use was for irrigation. This may account for the passage by the Legislature of California in 1943 (eight years after the Government had taken over the Project and two years after the taking found by the Court), of an Act declaring that Friant Dam should be used, among other things, for improvement of navigation (Cal. Statutes, 1943, p. 1747). This declaration made by the State, which did not own the Dam or have any control over it, would not detract from the Federal Plan, which showed that it contemplated the taking of all of the water of the San Joaquin River for irrigation, under which Plan the entire water of the river had been legally taken for the purpose of irrigation in 1941. We submit that these modifications in 1943 and 1944 could not affect the taking which was made in 1941.

Petitioner relies upon certain declarations contained in the Central Valley Project Act passed by the Legislature of California in 1933 (Cal. Stats., 1933, p. 2643), and now codified in the California Water Code. While it is true that that Act did contemplate some use of Friant Dam for navigation and flood control, it is clear that this was due to the fact that it was then contemplated that the water of the Sacramento River might be pumped up the channel of the San Joaquin River with a system of locks which could aid navigation. This is made clear by Bulletin No. 25 of the State Division of Water Re-

sources. This Project for locks was entirely eliminated by the Federal Plan dated November 26, 1935 (see "San Joaquin Pumping System", R., p. 93). The Court also found that later the Government entirely abandoned the Plan to pump the Sacramento River water up the channel of the San Joaquin River and in lieu thereof substituted an artificial canal (R., p. 94).

The Government in connection with its argument as to navigation and flood control construes Finding 49 (R., pp. 103-4) as if it constituted a finding that there was no evidence on the subject, and attempts to argue that the burden of proof was on the plaintiffs. This is not in accordance with the facts. The facts are, as the Court found, that we introduced the Government's own Plan set forth in Findings 32-36 (R. pp. 90-95, Appendix p. i), which showed that the Plan was to take all of the water of the river for irrigation, and we also introduced further evidence that in actual operation substantially all of the river would be taken in 36 out of 48 years and that during the other twelve years the flow would be reduced to a small percentage of the flow that would have occurred in the absence of such dam and diversion works. (Finding 49, R., pp. 103-104.) From this evidence the Court found, as we have already pointed out, that the Plan was to take all the water of the river for the purpose of irrigation. The only matters on which the Court found that no evidence was introduced were (1) what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channe

between Stockton and Suisun Bay; or (2) as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation; or (3) as to what might be the effect in preventing recurrences of interruption of service in interstate railways and highway traffic by floods. We, having established to the satisfaction of the Court that the plan was to take all of the water of the river for irrigation, it is difficult to see how there was any burden upon the plaintiffs to either prove or disprove these subsidiary matters. The Stockton Harbor and the channel between Stockton and Suisun Bay are both within tidal action, and we cannot see why the plaintiffs should have first proved whether the reduced flow increased or reduced the deposit of silt, or affected or did not affect an alteration of currents, or whether it affected favorably or unfavorably interstate railways or highway traffic. Even if any Congressional declaration could be construed as a declaration that the project was in aid of navigation or flood control, the evidentiary effect of this was sufficiently neutralized by the showing that substantially all of the water of the San Joaquin River was being taken solely for the purpose of irrigation, quite irrespective of whether it benefited or detracted from navigation or flood control. It would seem much more reasonable to hold that if the Government claimed that navigation or flood control were affected in some of the ways suggested in Finding 49, it should have proved that fact.

II.

EVEN IF THE PROJECT WAS TO ANY EXTENT IN AID OF NAVIGATION OR FLOOD CONTROL, IT IS CLEAR FROM BOTH THE STATE AND FEDERAL HISTORY OF THE PROJECT AND THE TERMS OF THE PLAN ITSELF THAT CONGRESS DID NOT INTEND TO RELY UPON THAT FACT TO ENABLE IT TO DESTROY VESTED RIGHTS OF RIPARIAN OWNERS WITHOUT COMPENSATION, BUT ON THE CONTRARY EXPRESSLY PROVIDED FOR COMPENSATION TO THE RIPARIAN OWNERS OF BOTH CULTIVATED LANDS AND GRASSLANDS.

It is well settled that Congress had full power to waive and relinquish any immunity which the United States has to pay compensation due to the navigation or flood control features of the Project.

Henry Ford & Son v. Little Falls Fibre Company, 280 U. S. 369.

In that case a license had been granted by the Federal Power Commission, a Federal Agency, under a direct recital that the acts of petitioner authorized by it "were found by the Commission to be desirable and justified in the public interest for the purpose of improving and developing Hudson River for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the federal government, in the exercise of its power to regulate commerce and navigation". While the Court recognized that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, still it held it was a reasonable construction of the Act that it was intended that if those rights were

extinguished, compensation should be granted. This was held to be a reasonable conclusion from certain provisions of the Act (1) making the licensee liable for damages occasioned to the property of others, (2) a provision that nothing contained should be construed as affecting or intending to affect the laws of the respective states relating to the control, appropriation and distribution of water (a provision very much like the provision of the Reclamation Act); and (3) the fact that the power of eminent domain was granted. Without in any way detracting from the correctness of the conclusion arrived at, we submit that, in the case at bar, we are not driven to inferences or construction, but we have a direct Act of Congress approving a plan which expressly provided for compensation, and the Federal Agency granted compensation which was appropriated by Congress.

That such immunity was waived is clear from the previous history of the Project, from the terms of the Plan, from the acts of the Department of the Interior making compensation, and the Acts of Congress approving the Plan and appropriating money from which payments were made.

The deliberate and ratifying action of Congress gives the force of law to the prior official action even if unauthorized when taken.

Silas Mason Co. v. Tax Comm., 302 U. S. 186.

This waiver is in line with the attitude of Congress expressed by Section 1(b) of the Flood Control Act of December 22, 1944, 58 Stat. 887, by which Congress expressly provided that the water rights of landown-

ers in the western states based on consumptive uses should be considered superior to the right of the United States to make improvements in aid of navigation under the Flood Control Act.

As we have already pointed out, the Plan authorized by Congress from its very inception provided for making compensation. With respect to three of the cases here involved the Government had contracted to pay Miller & Lux compensation and to pay from an escrow created by it compensation to anyone else showing a better right thereto. It had also paid Miller & Lux in cash close to $2,000,000 for damages to lands of the same type as the lands of plaintiffs. As to the other three cases the judgments merely apply to the lands involved therein the same rate of damages fixed by the government as to the other three cases. The Department of the Interior had made written declaration of the policy of the Government to make compensation (Appendix, p. xvi).

The undisputed facts shown by the record are that the average yearly flow of the San Joaquin River is 1,811,082 acre feet (R., p. 85). Prior to the adoption of the Central Valley Project, 1,458,538 acre feet of this water had been utilized by controlled irrigation (R., p. 84). Besides this, 246,000 acre feet were beneficially used by uncontrolled flow over 82,000 acres of grasslands using three acre feet per acre, or 246,000 acre feet (R., pp. 88-9). This indicates a total beneficial use of 1,705,138 acre feet of water, which is almost equal to the average annual flow of the River. The record shows that this water was used on 285,000

acres of crop lands (R., p. 93) and 250,000 acres of submarginal or grasslands (Appendix, p. viii), making a total area benefited amounting to 535,000 acres of land. The record further shows that the Plan contemplated that the water theretofore used on this acreage would be carried by the Madera Canal to 140,000 acres (Appendix, p. vi) and by the Kern Canal to 1,000,000 acres in the southern part of the Valley (Appendix, p. vi), making 1,140,000 acres to benefit by the water theretofore used by plaintiffs and other irrigators.

This area involved one of the largest irrigated areas in the world. Must it not be assumed that not only the owners of those water rights but the State and Federal Government were solicitous of the rights of that area and framed legislation to protect those rights in order that other areas might be developed? The danger that it might be claimed that the rights might be seized without compensation in view of the alleged navigable character of the River was no secret and therefore a plan was formulated that required compensation, and Congress approved that plan and appropriated money to make such compensation. To now contend that no compensation is due because of the relatively small, if any, effect on navigation or flood control, is to make a contention which Congress would not have countenanced and which it flatly repudiated.

III.

THE ACTS OF THE DEFENDANT IN CLOSING THE DAM AND IMPOUNDING 17,400 ACRE FEET OF WATER IN OCTOBER, 1941, CONSTITUTED A TAKING OF PLAINTIFFS' RIGHTS.

The findings on this subject are found in the record, pages 32 to 37. These acts clearly constituted a taking within the reasonable rule laid down by this Court in *United States v. Dickinson,* 331 U.S. 745. The Government clearly considered that this initial storage constituted a taking, because in its contract with Miller & Lux Incorporated it provided that actions must be brought "prior to the sixth anniversary after the initial storage or diversion of waters of the San Joaquin River by the United States by means of Friant Dam" (R., p. 96).

The fact that both the Bureau and Miller & Lux Incorporated considered the "initial storage" on October 20, 1941, to constitute a taking, is clear from the finding that the contract only authorized deductions therein by the Government where they were authorized by actions commenced "prior to the sixth anniversary after the initial storage" (R., pp. 96-7). Obviously this referred to the six-year period allowed for suing under the Tucker Act. That period runs from the "taking". This definitely fixes the initial storage as the taking.

That the storage of this 17,400 acre feet of water constituted a taking is obvious in view of the fact that under the law of the State the storage of that quantity of water for a public purpose impressed the water of the river to the full capacity of the reservoir

with that public use and deprived the plaintiffs of any right to recover the same.

Collier v. Merced Irrigation District, 213 Cal. 554.

The mere fact that this storage occurred at a period of the year when others than the petitioner might have been entitled to all the water of the river, should not be controlling in determining whether or not there has been a taking. The best interest of the Government itself would be to have its own rights definitely fixed and the rights of everybody cut off by a taking and failure to file suit within the six-year period. Just what effect this water would have on the underground water table or just what effect it might have on the surface would undoubtedly differ as to every piece of land in the flood plain. No one could say whether or not those having prior rights would in fact exercise them, or whether or not the water would in fact flow on down the stream. The fact is that the Government made an invasion upon the river which barred the plaintiffs to object to the storage of water up to the full capacity of the reservoir. Their rights were taken and they had no right after that time to bring any action in law or in equity to recover their property. All they had was an action for compensation.

IV.

THE COURT WAS FULLY JUSTIFIED IN AWARDING INTEREST FROM OCTOBER 20, 1941, TO DATE OF PAYMENT.

The only objection to the allowance of interest is based on the fact that due to war conditions which commenced in December, 1941, the Government was unable to complete its Project and actually use all the water contemplated to be taken by the Project, although as we have already pointed out, it did store 17,400 acre feet in 1941, 302,600 acre feet in 1944 and 430,000 acre feet in 1945 (R., pp. 101-2). The taking in a legal sense being complete on October 20, 1941, the compensation is to be fixed as of that date, and the amount allowed as interest is not interest in the legal sense, but is compensation for delay, for which the Court allowed only 4%. It would be unendurable to have the compensation depend on the actual use rather than on the use which the condemnor was entitled to make. It is well settled that it must be assumed that the condemnor will make the use which it is entitled to make to the extent most injurious to the landowners, and that damages must be fixed on that assumption.

East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 762.

It should be noted that the contract by which the Bureau set up the escrow was dated July 27, 1939, and provided that Miller & Lux Incorporated should be entitled to interest from the date of the contract. In view of that fact the Government was not injured by an allowance of interest from October 20, 1941 (Appendix, p. xv).

V.

THE FINDINGS AS TO THE RIGHT TAKEN WERE SUFFICIENT.

The petitions alleged the riparian rights of plaintiffs and that the Plan was to take all of the water of the San Joaquin River flowing at Friant for the irrigation of non-riparian lands in certain specified counties (Par. VI, R., p. 2; Par. V, R., p. 19; Par. IV, R., p. 46; Par. V, R., p. 150; Par. IV, R., p. 155, and Par. V, R., p. 158). The Court found that that was what was taken (Finding 32, R., p. 90). The Court also found the depreciation which took place in the value of plaintiffs' land by this taking (Findings 29, R., p. 88; 42, R., p. 188; 46, R., p. 190; 49, R., p. 190; 56, 57, R., p. 110; 63, R., p. 113; 75, R., p. 123; 85, R., p. 127, and 87, R., p. 128). There was therefore no uncertainty as to the right taken.

VI.

THE RULING OF THE COURT OF CLAIMS THAT THE CALIFORNIA CONSTITUTIONAL AMENDMENT IN NO WAY DEPRIVED THE PLAINTIFFS OF THEIR RIGHT TO COMPENSATION FOR DEPRECIATION IN VALUE OF THEIR LAND BY THE TAKING OF ALL THE WATER OF THE RIVER, WAS FULLY JUSTIFIED.

It should be noted that in accordance with the findings in this case the Superior Court of the State of California in an action between Miller & Lux and Madera Irrigation District had held that Miller & Lux had the right to enjoy this high flow of the river (R., pp. 78-81). As three plaintiffs here are successors in

interest of Miller & Lux in the lands of the plaintiffs, and the other three plaintiffs are under contract as to water rights in privity with Miller & Lux, and the Government is successor in interest of the Friant Dam, and the applications for appropriation by Madera Irrigation District (R., pp. 78-9) that adjudication would seem to be *res judicata*. It will be noted that that decision was rendered January 4, 1933, which was five years after the passage of the Constitutional Amendment in question.

The actual effect of the Constitutional Amendment is not yet fully determined by the Courts of California, but the Courts have always pointed out that its meaning and effect will only be determined as numerous cases presenting peculiar facts come before the Court for determination. The most definite thing, we think, that the Courts of California have decided with regard to the Amendment, is that if any use of the river is beneficial, a riparian owner is entitled to make it and is entitled to reasonable compensation if he is deprived of it. The former rule that he was entitled to prevent any diversion or use of the water entirely irrespective of injury is no longer recognized. The Courts also by reason of the Amendment, concluded that the Courts should endeavor to work out some practical physical solution of the various cases and may require changes in methods of diversion or use generally at the expense of those desiring to appropriate the water of the stream. We do not intend to write a treatise on the water law of California and the effect of the Constitutional Amendment in every

possible situation, but will confine ourselves to the question whether the Government was right when it agreed to pay to Miller & Lux Incorporated $511,000 damages to certain grasslands which enjoyed the high flows of the river.[5]

The Court first passed on and upheld the Constitutional Amendment as a reasonable exercise of police power in *Gin S. Chow v. Santa Barbara,* 217 Cal. 673. In that case the trial Court had denied an injunction sought by the riparian owner against the storage of water of the Santa Ynez River, one of the coastal range streams fed by rainfall and not by snow. The defendant did not seek to divert all the water of the stream, but only certain flood waters which were extraordinary flows within the meaning of the case of *Gallatin v. Corning Irrigation District,* 163 Cal. 405, in which the Supreme Court held that such extraordinary flows did not belong to the riparian owner. The Court also found that the water intended to be impounded was in excess of all the water that could be beneficially used by the plaintiff and that no injury would result to the plaintiff by the storage of the floods in question (pp. 694-5). The contention of the plaintiff and appellant was that however small or unsubstantial may be the invasion, it should be enjoined (p. 694). The Court held that whatever might have been the rule prior to the Constitutional Amendment, such was not the rule under that amendment, but that the purpose of the amendment was to con-

[5]This matter will be found considered at some length in Stanford Law Review, Vol. 1, p. 172.

serve the waters of the state "without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners" (p. 700). In that case the Court held the water "was of no substantial benefit to the riparian owner" (p. 700). The Court pointed out that the amendment was only intended to regulate the right, not to destroy it (p. 703). The effect of the amendment was to limit the riparian owner to "a reasonable benficial use" of water (p. 704). Such reasonable beneficial use depends upon the facts of each case (p. 706) to be determined by the trial Court (p. 706). The reason why the use by the plaintiff was unreasonable was that there was "no substantial or any benefit" to him and "no injury by the taking thereof" (p. 706).

The next case in which the matter came before the Court was *Peabody v. Vallejo,* 2 Cal. (2d) 351. This case was decided by the trial Court, which granted an injunction, before the Supreme Court had passed upon the effect of the Constitutional Amendment. The City of Vallejo only claimed the right to store extraordinary floods (p. 361). The findings of the trial Court were that the flows were not extraordinary and were put to beneficial use. The Supreme Court thought that the case had been decided without regard to the Constitutional Amendment (p. 363). That Court stated the extreme views of the parties, the plaintiff claiming the right to the full flow of the stream without diminution, regardless of the unreasonableness of his uses and regardless of waste or surplus which such uses might entail, and the de-

fendant insisting that plaintiffs were only entitled to the ordinary, as distinguished from flood or freshet, flow. The Court held that neither of these views was in accord with the amendment (p. 365); that the doctrine of reasonable use is the doctrine of the amendment (p. 367). The Court states the general effect of the amendment, and stated that the "problem is to apply these rules in the varying circumstances of cases as they arise" (pp. 367-8). The Court held that the water might be stored "subject to the rights of those who have a lawful priority in a reasonable beneficial use" (p. 368). The Court also held that the distinction between the ordinary and extraordinary floods was no longer applicable (p. 368). The appropriator can only under the amendment appropriate the surplus over the water beneficially used by the riparian owner (p. 368). The Court stated that how the surplus can be used having due regard to riparian rights cannot be determined in one case (p. 369). It held that overflow merely to deposit silt or to remove salt was not within the riparian right even at common law (p. 369). It held that the asserted right to have the flood or freshet water overflow the lands and never return to the stream cannot be supported (p. 369). It should be noted that the Court did not say that the right to have such overflow to irrigate the land was unsupported. In this connection the Court referred to *Montecito Valley Water Company v. Santa Barbara,* 144 Cal. 578, but that was apparently a miscitation, as there seems to be nothing on that subject in that case. The Court held that the right

to maintain the underground level of the water is recognized "but subject to the limitations of the new state policy" (p. 370). This right is to be handled on the same basis as a right of overlying land owners in percolating waters as against an appropriator for distant land, namely, that the appropriator can only take a surplus over the needs of the overlying landowner (p. 371). The right in the underground water is subject to the rule of reasonable use (p. 372). The Court further held that "There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner * * * are entitled to the protection of the Courts at law or in equity" (p. 374). In a case where injunction was not proper, a declaratory judgment may be entered declaring such rights (p. 374). The Court further held if the appropriative right caused a substantial diminution of the supply, the owner is entitled to compensation for the resulting damage to the land but that the technical infringement of the right is not actionable (p. 374). The Court further said "Any use by an appropriator which causes substantial damage thereto, taking into consideration all the present and reasonably prospective recognized uses is an impairment of the right for which compensation must be made" (pp. 374-5). The right to the pressure of the stream to force water underground is a recognized right (p. 375). The Court is also authorized to make a physical solution so as to make the appropriative right and the right of the riparian owner harmonize

(pp. 380 and 383). The Court also referred to the situation of the town of Suisun which pumped water but only needed .37 of an inch. The Court held that any interference with it was unsubstantial (p. 382).

The next case was *Hillside Water Company v. City of Los Angeles,* 10 Cal. (2d) 677. There the Court upheld the right of a landowner to be compensated for being deprived of the right to have an underground water supply kept at an elevation sufficient to support surface uses, and thus minimize the requirements of surface irrigation. In other words, the Court not only recognized the right of the landowner to protect the flow of the stream, at a high enough elevation to produce an underground water supply which he might pump for irrigation uses, but high enough so that by capillarity it would help to irrigate his land and thus reduce the amount of water which he had to apply on the surface.

In *City of Lodi v. East Bay Municipal Utility District,* 7 Cal. (2d) 316, the Court held that while as against a taking for public use, a prior user may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense. This was also a case in which the Court required the river to be maintained at a sufficient height so that the water was forced into the gravels so that the landowner could extract it, although this required a large part of the water of the stream to run to the ocean, and it was held that the landowner could not be compelled to expend any large sum of money to lower his pumps.

In *Los Angeles County Flood Control District v. Abbot,* 24 C. A. (2d) 728, the Court held that where it was beneficial to the land to have the water overflow it and deposit sand and gravel upon it, this was a valuable property right which, if invaded, must be compensated for.

The case of *Meridian Ltd. v. The City and County of San Francisco,* 13 Cal. (2d) 424, did not involve any right to the benefit of overflow, the plaintiff's land being cultivated and the amount of water reasonably necessary therefor being proved without dispute. Notwithstanding this, the trial Court enjoined the appropriator from storing water of the stream on the theory that the location of the storage was so far removed from the plaintiff's lands that it would be impossible for the plaintiff to know that the storage was without interference of his rights. In reversing this judgment the Court referred to the scope of the amendment limiting the right of the riparian owner to the amount of water reasonably required, and said that the scope of the amendment can be determined only by a large number of cases presenting different conditions (p. 444). The Court said "that the riparian owner has a prior and paramount right to this use and if necessary is entitled to the full natural flow of the stream" (p. 445). The Court also said that to permit waters to pursue their natural course to the sea is not waste in the constitutional sense (p. 448). The Court said that storage by the Central

Valley Project is a beneficial use within the amendment, but that "such right of storage must necessarily be subordinate to all beneficial uses on the stream made in the exercise of riparian and prior appropriative rights" (pp. 449-50).

In *City of Elsinore v. Temescal Water Company*, 36 C. A. (2d) 116, the Court held that the landowner was entitled to maintain the level of the lake for recreational uses of adjoining land and prevented diversion of the stream which reduced the level of the lake. The use of the full, natural level of the lake for that purpose was held to be reasonable use, and in no way violated the Constitutional Amendment.

In *Williams v. City and County of San Francisco*, 24 C. A. (2d) 630, the Court put special emphasis on this provision of the Constitutional Amendment: "Provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of the water of the stream to which his land is riparian under reasonable methods of diversion and use".

In the case at bar the Court finds that this high flow is beneficial, that it produces additional feed and increases the value of the land to the extent of $9.00 per acre.

The Court has not awarded damages for deprivation of the *overflow* but for the deprivation of the *flow* at high stages. In other words both the complaints and the findings and judgments, and the evidence contained in the findings show that all the

riparian rights have been taken. This, however, includes every benefit from the flow of the river. It includes percolation into the land, flow through branch channels on the land, overflow on the land, and the right to use any conceivable methods of artificially placing the water on the land.

Even if under the Constitutional Amendment the Court should say that the owners cannot insist upon the full flow of the stream to overflow the land, still they could insist upon a sufficient amount of water to reach their land at such stages so that they might by means deemed reasonable pump or otherwise place the water on the land. But this is made impossible by the act of the Government in taking all the water of the river. Under such circumstances no physical solution of the conflict is possible. Naturally the landowner has enjoyed the overflow as long as it has been available. If under the police power the overflow can be prevented by structures such as levees, or by storage, that can only be done by leaving in the stream a sufficient quantity to serve the plaintiffs when the water is diverted by reasonable methods of diversion and use.

VII.

THE COURT OF CLAIMS DID NOT MISINTERPRET THE EXCEPTIONS AND RESERVATIONS CONTAINED IN THE POTTER, ERRECA AND GERLACH LIVE STOCK COMPANY DEEDS.

The Government in effect construes these deeds so as entirely to destroy any riparian rights in the land.

whereas it is clear that all that the grantor, Miller & Lux Incorporated, was attempting to do, was to preserve as superior its own water rights and the right to dispose of them to the Government or anyone else, and also to preserve the storage rights which it had granted to power companies. This will be made clear by the provisions of each of these deeds.

Potter deed.

The deed to J. Sheldon Potter is found in finding 51 (R., p. 106) and it will be seen that by it this land was made subject to certain "existing water rights" of Miller & Lux Incorporated and its subsidiaries "whether established by appropriation, prescription, or existing contract." Of course to make a certain piece of land subject to other rights does not take away all of the rights of such land but merely subordinates them to certain existing rights. In other words, it does nothing more than fix priority, leaving the land granted to enjoy the surplus after the other rights are supplied. The deed also reserves "the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor." The general effect of these contracts is stated in finding 14 (R., p. 77), and the surplus water found to exist for plaintiffs gave full effect to the change in the river flow by the power storage. The deed also reserved to Miller & Lux Incorporated and its subsidiaries the right to sell and convey any water right already established in it or them by appropriation or prescription and to

change the place of use of that water and to store the same. This of course did not in any way increase a water right which had already been made superior to the rights of the Grantee, and in no way affected the right of the plaintiff to any water in excess of the water already acquired by appropriation or prescription.

This is made still more clear by the fact that before this deed was executed Potter was asked to take a deed in which the grantor reserved "the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries", and also reserved "the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said river and its tributaries", and also the right to "use such waters for the irrigation of riparian or nonriparian lands within or without the water shed of said river." (R., p. 107.) The fact that the plaintiff refused such a conveyance and insisted on a conveyance only subjecting his land to the prior rights of the grantor by appropriation, prescription or existing contract, shows clearly that there was no intent of the parties to denude these lands of riparian rights.

Erreca deed.

The exceptions in the deed to the plaintiff Martin Erreca are found in finding 59. (R., p. 111.) That deed expressly provided "that the riparian rights of the land herein conveyed shall always remain." This certainly negatives any intent to separate the ripar-

ian rights from the land. The deed further provided that such rights should "be exercised subject and subordinate to the water rights of the grantor * * * whether such water rights be riparian, appropriate, or prescriptive." This again only limited, or rather subordinated, the land granted to the water rights already existing in the lands of the grantor, but certainly those rights were only rights to use such quantity of water as was required for beneficial use on the lands of the grantor, and did not amount to an absolute ownership of the entire river, and the reservation of those rights in no way affected the right of the grantee in the surplus water of the river. The deed further contained the provision "to the end that the grantor, its successors, subsidiary, and affiliated companies, may use, enjoy and transfer *said water rights,* including the *right* to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns". A reasonable construction of this latter clause is that all that was reserved was the right to transfer the rights of the grantor as a riparian owner, appropriator, or by prescription, to use the water to the extent that it was appropriated or beneficially used, and that the contracts which it had made with the power companies should be respected. However, the parties thought that there might be some misconstruction of this provision and that it might be construed in a broader manner, and therefore the deed provided: "This covenant and condition shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in

favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs and assigns, *to the extent herein provided"*. This made it clear that the reservation was a limited one and merely subjected or subordinated the land granted to the fixed rights of the grantor, and was not to be construed as an extinguishment of riparian rights of the lands conveyed, or as in any way taking away the rights of the land to enjoy the surplus water of the river.

Gerlach deed.

The exception in the deed to the predecessor of Gerlach Livestock Company is found in finding 79. (R., p. 125.) This deed provided "This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain". This was certainly inconsistent with the thought that the riparian right was to be destroyed and reserved. It is further provided that this right shall "be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which grantor owns stock), whether such water right be riparian, appropriative or prescriptive". This was clearly a limited reservation of existing water rights of the grantor and its subsidiaries, whether that right was riparian, appropriative, or prescriptive, and it is clear that this had reference to such rights as the grantor had in lands other than the land granted. This was declared to be "to the end that the grantor, its successors, subsidiary, and affiliated companies,

may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns". This we submit only reserved the right of the grantor with respect to other lands and to use, enjoy and transfer the same, including the right that it had already exercised of contracting for permitting the storage of water for power on the upper reaches of the San Joaquin River. However, here again the parties apparently feared that a broader meaning might be attached to these words, and it was therefore provided "This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary, and affiliated companies, against the grantee, his heirs, and assigns *to the extent herein provided.*"

In construing these instruments there is a marked difference to be observed between a reservation of "water *rights*" and a provision reserving all the water of the river. It is possible for the owner of land, by grant, entirely to deed away all right to the water of the river and thus denude the land of any right therein. We may assume that the same thing can be done by a reservation in a grant of the land. In other words, the owner of the land, in granting it, could provide that he was not granting any right of the land in the water of the river. In that manner any right of the land to the water of the stream could be separated from the land. How easy it would have been to have done that in all of these deeds containing these conditions, exceptions and reservations if that

was what was intended. The mere fact that they all preserved a riparian right in the land and meticulously endeavored to make only limited and restricted reservations, clearly indicates that all that was intended was that the land was subordinated to the existing water rights of the grantor with respect to other lands, and that those rights might not only be enjoyed, but they might be transferred to others and used for other purposes.

Finding 72 (R., p. 122) makes it plain that the true intent of the reservations was to preserve the existing rights of Miller & Lux and not to "reserve" the claim of the Government to take all the water of the river.

With regard to the reservations in the Martin Erreca and Gerlach Live Stock Company deeds, our position was and is that the clause "including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns", clearly related only to *existing* rights under which Miller & Lux had contracted for such storage with certain power companies. We think that from the language of the entire instruments it is clear that nothing was reserved except existing rights. This also follows from Finding 72 (R., p. 122). However, the Court of Claims did not deem it necessary to determine that question, since the clause only permitted *storage* and did not permit *diversion*, and the Court of Claims felt that the real damage was done by the diversion rather than by the storage (R., pp. 137-8). This no doubt is based on the theory that storage might be permissible provided sufficient water was

supplied to irrigate plaintiffs' lands under reasonable methods of diversion and use. If this Court does not agree with the decision of the Court of Claims that the real damage done to the plaintiffs was not by the storage, but by the diversion, then we submit that this right of storage contained in the reservation should be limited to existing rights of storage under the contracts with the power companies. In this connection we think it well settled that a reservation of this kind should be limited to existing rights.

Barataria v. Ott, 84 Miss. 737, 37 South. 121;
Dyer v. Sanford, 9 Metc. 395, 43 Am. Dec. 399;
Hill v. Cutting, 107 Mass. 596;
Village of Terrace Park, et al. v. Errett, 12 F. (2d) 240;
Chidester, et al. v. City of Newark, et al., 31 F. Supp. 892;
Mott v. Nardo, 73 C. A. (2d) 159, 166 P. (2d) 37;
Powell v. Big Horn Low Line Ditch Co., 81 Mont. 430, 263 Pac. 692.

We respectfully submit that the judgments should be affirmed.

Dated, San Francisco, California,
February 4, 1949.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondents.

(Appendix Follows.)

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Appendix

A.

PLAN OF THE CENTRAL VALLEY PROJECT EMBODIED IN RIVERS AND HARBORS DOCUMENT NUMBERED 35, SEVENTY-THIRD CONGRESS AUTHORIZED BY SECTION 2 OF THE RIVERS & HARBORS ACT OF AUGUST 26, 1937 (50 STAT. 844, 850), SET FORTH ON PAGE 4 OF THE PETITION FOR WRITS OF CERTIORARI HEREIN.

The Secretary of the Interior
Washington

November 26, 1935

The President,
The White House.

My dear Mr. President:

The Supreme Court of the United States in the Parker Dam decision (United States v. State of Arizona, 295 U.S. 174) indicated that Section 4 of the Act of June 25, 1910 (36 Stat. 835), is applicable to irrigation projects constructed under the National Industrial Recovery Act and this report on the Central Valley project, California, is made to you under said statute of 1910 and under subsection B of Section 4 of the Act of December 5, 1924 (43 Stat. 702).

Section 4 of the Act of June 25, 1910 (36 Stat. 835), provides, in effect, that after the date of that act no irrigation project to be constructed under the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, shall be undertaken unless and until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, Section 4, Act of December 5, 1924 (43 Stat. 702), provides as follows:

> "That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

General Description of Project.

The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will

regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition, water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply.

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features.

The principal engineering features of the project are as follows:

Kennett Dam Unit—The Kennett reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k.v.a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k.v.a. power plant will be constructed below the Kennett dam. From the power plants a 200 mile power transmission line will extend to a main distributing substation near Antioch on Suisun Bay.

Contra Costa Conduit—A canal, capacity 120 second feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial and agricultural water requirements.

San Joaquin Pumping System—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett reservoir through a channel into San Joaquin delta for salinity control, irrigation and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota Weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett dam, reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant dam and reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights and general expenses	8,000,000
Total	$170,000,000

First Year Construction Program.

Under date of September 10, 1935, you approved an allocation of $20,000,000 for the Central Valley Project, which amount was later reduced to $15,000,000. Construction on the following units is recommended for the first year:

Kennett Reservoir Unit
Contra Costa Conduit
Friant Dam and Canals.

An amount of $15,000,000 can be efficiently and economically expended on the foregoing units during the first year of construction.

Adaptability of Land for Irrigation, Crop Production and Settlement.

The climate is favorable and the soil, if water is available, is adaptable to the production of a wide variety of crops. The principal crops now raised in the San Joaquin Valley are citrus and deciduous fruits, grapes, alfalfa, cotton, nuts, and figs; in the Delta, asparagus, celery, potatoes as well as deciduous fruits; and in the Sacramento Valley there is a heavy production of rice in addition to other grains and deciduous fruits.

The valley is highly developed. The lands are of high value and produce large returns. With an attractive climate, fertile soil and stable markets, water is the one remaining necessity to prosperous, successful agricultural industry. It has been highly successful and supports a large farm population. Much of the fruit is shipped to eastern markets but many other items, such as the products of dairying, are marketed within the state and reduce the quantities imported into the state. Products are largely non-competitive with other sections of the country, since many of them, such as nuts, figs, raisins, asparagus, are produced almost wholly in California.

Transportation facilities are excellent. These include railroads and improved highways leading to the Metropolitan center of Los Angeles and San Francisco and to eastern markets.

The project is not designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of

a high type. Any increase in irrigated land will be small and will come into being slowly over a long period of time. Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

Social and Economic Values.

The economic values of the project are of great magnitude. The project will not bring into production new agricultural areas but will maintain present values and civilization. Of the 3,000,000 acres now irrigated, 1,000,000 face acute water shortage, and abandonment is proceeding rapidly. The values in jeopardy are large, as without water, not only will lands dry up, but communities will vanish and whole sections return to desert, as is now occurring in the San Joaquin valley. A share of the loss will be suffered by persons not residing in the areas directly affected.

Control of salinity in the delta of the two rivers near Sacramento is part of the agricultural maintenance phase of the project. Here 400,000 irrigated acres with an annual crop value of $30,000,000 are menaced by salt water from upper San Francisco Bay. Some abandonment has occurred and the whole area is endangered. In this same general area is a large industrial section which is also short of water by reason of increasing salinity. Here 100 industrial plants

produce annually $100,000,000 value of manufactured products, and while not facing extinction, are suffering damage and expense from lack of water.

Navigation on the Sacramento River, one of the important waterways of the nation, has been greatly damaged by low water, navigation having been practically abandoned above Sacramento in the summer season. The national navigation and flood values of the project have been found by the War Department to be $12,000,000, and the recently enacted Rivers and Harbors Bill (Public No. 409, 74th Congress), by reference to the War Department report approves the project and authorizes the appropriation of $12,000,000 for it.

A large power house at the main storage dam will produce nearly a billion and a half kilowatt hours of electric energy annually, which will be sold at less than existing rates, thereby benefiting power users and at the same time producing a large revenue, which will go toward the repayment of the construction costs.

Probable Return to Reclamation Fund Of Cost of Construction.

The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the project works. The estimated cost of construction is $170,000,000 and the annual cost, includ-

ing repayment of all other charges is $7,500,000. It is estimated that annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost.

I find that the project is feasible from engineering, agricultural and financial standpoints, that it is adaptable for settlement and farm homes, that the estimated construction cost is adequate and that the anticipated revenues will be sufficient to return the cost to the United States.

The Commissioner of Reclamation has approved and recommended the construction of the project. I therefore recommend the approval of the Central Valley development as a Federal reclamation project.

Sincerely yours,

(Sgd.) Harold L. Ickes,

Secretary of the Interior.

Approved: Dec. 2, 1935.

Franklin D. Roosevelt,

President.

B.

PORTIONS OF CONTRACT FOR PURCHASE OF MILLER & LUX WATER RIGHTS DATED JULY 27, 1939.

"Payment of Purchase Price and Conveyance of Properties.

"13. The Vendors shall, within fifteen (15) days after notice of the execution of this contract by the United States, execute and deliver to the United States a deed, in the form annexed hereto and marked Exhibit "A", duly executed and acknowledged by the Vendors, conveying to the United States all of the property and property rights herein agreed to be conveyed, together with a deed of reconveyance from The Bank of California, N. A., as Trustee, wherein and whereby said Trustee shall reconvey to Miller & Lux, Incorporated, a corporation, all of the water rights, or rights to the use of water, and other rights or properties, herein agreed to be transferred and conveyed to the United States, free and clear of the lien of that certain Trust Indenture dated the first day of October, 1925, wherein Miller & Lux, Incorporated was Trustor and the said The Bank of California, N. A. was Trustee. The United States shall purchase said water rights, or rights to the use of water, and other rights and properties herein agreed to be coveyed on the terms herein expressed, and upon execution and delivery of said deed and said deed of reconveyance, it shall cause to be paid to the Vendors as full purchase price and full payment for all damages for taking possession of said rights and for entry upon said property, and damages resulting from the construction,

operation and maintenance of said Friant Dam and other works to utilize such rights, the sum of two million, four hundred and fifty thousand dollars ($2,450,000.00), of which sum $1,938,650.00 shall be paid to Vendors and $511,350.00 thereof shall be deposited in escrow, within the period as hereinafter in Subdivision (e) of Article 14 of this contract provided."

* * * * * * * *

"(e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to-wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.

"There is delivered herewith to each of the parties hereto, and as part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "Bureau of Reclamation, United States Department of the Interior, Central Valley Project—Map showing grass lands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands

in this contract referred to as "Grass Lands" and as "Riparian Lands". The boundaries of said Grass Lands are outlined in green and the boundaries of the Riparian Lands are outlined in orange. Said map need not be recorded.

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B", are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B", are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall

be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; provided, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"IT IS AGREED AND UNDERSTOOD that there shall be no payment out of said escrow as the result of final judgments or decrees entered by the consent of the United States, or as the result of failure by the United States to defend said actions or to appeal said actions, unless said judgments or decrees are entered or permitted to be entered with the consent of the Vendors.

"No part of the escrow fund herein provided for shall be used to pay costs, expenses, or attorneys' fees incurred in defense of said suits and actions referred to in this subdivision (e) of Article 14, it being understood and agreed that the United States and Vendors shall each pay its costs, expenses and attorneys' fees, if any, incurred in said litigation.

"Payment out of the escrow shall be made annually at or within thirty days after the end of each calendar year, each payment to cover all final judgments or decrees as above described entered during each said year. Payment shall be made by the delivery by the escrow agent to the Secretary of the Interior, or his

authorized representative, of securities equal to the amount then owing to the United States, or as near thereto as possible considering the basic units of the securities in escrow. For this purpose, securities delivered shall be valued at the current market values thereof.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities.

"Interest accrued on securities remaining in escrow on any interest maturity date shall become the property of the Vendors, and the escrow agent shall at such times deliver the matured coupons to the Vendors. The costs of the escrow shall be borne by the Vendors.

"The escrow agent shall reinvest the principal of escrowed securities that mature or are retired during the life of the escrow, in such Federal securities as are designated by the parties hereto."

C.

United States
Department of the Interior
Bureau of Reclamation
Washington

June 22, 1939

Office of the Commissioner
Mr. Walker R. Young
Supervising Engineer, U. S. Bureau of Reclamation
Old Post Office Building,
Sacramento, California,

Dear Mr. Young:

It has come to my attention that there has been some apprehension among landowners along the San Joaquin River between Friant and Gravelly Ford concerning the effect upon their lands through construction of Friant Dam.

The policy of the Government is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam.

The investigations now being made by the Bureau of Reclamation are intended to determine the effect Friant Dam will have on these properties in order that damages may be ascertained and compensation made before such damages actually occur.

You may assure the landowners that if and when our investigations determine the extent to which their

property rights will be invaded, appropriate action will be taken.

Very truly yours,

(Sgd.) John C. Page

Commissioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 4-9

THE UNITED STATES, *Petitioner*
vs.
GERLACH LIVE STOCK COMPANY (a corporation)

THE UNITED STATES, *Petitioner*
vs.
J. SHELDON POTTER

THE UNITED STATES, *Petitioner*
vs.
MARTIN ERRECA

THE UNITED STATES, *Petitioner*
vs.
JAMES J. STEVINSON (a corporation)

THE UNITED STATES, *Petitioner*
vs.
ARCHIBALD J. STEVINSON

THE UNITED STATES, *Petitioner*
vs.
3-H SECURITIES COMPANY

On Certiorari to the Court of Claims.

RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California,
Attorneys for Respondents.

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vs.
3-H SECURITIES COMPANY

On Certiorari to the Court of Claims.

RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

We were informed on September 22, 1949, that a Supplemental Brief was to be filed by the United States and we were furnished with a typewritten copy thereof. As it is directed principally at arguments advanced by the brief of *amici curiae* and we are informed that *amici curiae* are preparing a brief in reply to this Supplemental Brief, we will not increase the burden of the Court by an additional brief on behalf of respondents, except to call the attention of the Court to that part of the Supplemental Brief (pp. 38-40) where House Document No. 332, 65th Congress, First Session, is considered. It is there sought to give the impression that that Document expresses the views of the governments that it was feasible to render the San Joaquin River navigable, whereas, as the Court of Claims points out in its opinion on demurrer, the contrary view of the Government on that subject was expressed later in House Document No. 791, 71st Congress, Third Session.

House Document No. 332 (65th Congress, First Session) is a report on the preliminary examination and surveys of the San Joaquin River, California, with a view to its improvement up to a point at or near Herndon by means of locks and dams or otherwise. Among the conclusions given in the statement of general conditions are the following from pages 13 and 17 of the report:

> *"It is believed that full use will be made for purposes of irrigation of all the water that can be so stored, and that no assistance to navigation*

can be expected from such sources." (p. 13.) (Italics ours.)

"The flood condition in the San Joaquin Valley is not as serious as in the Sacramento Valley for the following reasons:

First. The floods are not as great.

Second. They occur during the irrigating season.

Third. In the delta region where the channels are generally leveed, there are several channels available to carry the flood waters. On the middle section of the river there are some low levees, but as a rule but little effort has been made to confine the river to its channel, and it spreads through many side sloughs over great areas of bottom lands, which are only used for grazing when the water subsides." (p. 17.)

Paragraph 55, page 38 of the report is as follows:

"It is quite possible that the distribution of water diverted by canals, and especially of that used in flood irrigation, may not have been such as to produce the greatest economic results; e.g., the amount used on grazing or wild-grass lands may have been excessive as compared with that used to grow alfalfa, when the comparison is based upon the quantity of beef which each form of irrigation produced per acre. Whether or not this has been or is now the case the facts are that the area of agricultural lands needing water is greater than the river can supply, even when the most advantageous and economical use has been developed, *and that the hope that better irrigation*

practices would make available more water for navigation use is futile." (Italics ours.)

The proposed act to restore the navigability of the stream was never enacted into law and the Government never carried out the recommendation to prevent diversions for irrigation purposes.

The later report of the army engineers on the San Joaquin River is contained in House Document No. 791 (71st Congress, 3d Session), dated February 27, 1931. The following paragraphs are from the report of Lytle Brown, Major General, Chief of Engineers, to the Secretary of War, contained in said document:

"5. The existing project for the improvement of the San Joaquin River for navigation provides for a channel 26 feet deep at mean lower low water from the mouth of New York Slough to the city of Stockton, a distance of 45 miles, with suitable passing places and a turning Basin at Stockton; for certain local channels 9 feet deep in the vicinity of Stockton; and for snagging, removing overhanging trees, and constructing wing dams from Stockton to Hills Ferry, 86 miles, to facilitate light-draft navigation on this part of the river during higher stages. The 26-foot channel to Stockton was authorized in 1927 at an estimated cost of $3,715,000, of which local interests contribute $1,307,500 in cash, besides furnishing all lands and rights of way. It will be completed about 1933. At the present time there is a controlling depth of 9 feet to Stockton. Between Stockton and Hills Ferry there is ordinarily a 6-foot depth from April to June, but navigation

is usually impracticable during the remainder of the year. During the 10 years ending 1929 the commerce of the section below Stockton averaged 826,000 tons annually. There is no appreciable commerce above that point. The division engineer is of the opinion that the existing project is sufficient for the present and prospective needs of navigation. *Further improvement above Stockton would require canalization, and the cost would be substantially in excess of the anticipated benefits.*" (p. 6.) (Italics ours.)

"12. The State of California has long realized the importance of a program for the conservation of the waters of the Great Central Valley and has expended nearly $1,000,000 for surveys and studies of this problem. The broad solution of this problem generally agreed upon is that the streams in the mountainous area should be set aside for private power development and placer mining; that the flow of the streams should be regulated by reservoirs in the foothills; that provision should be made for the transportation of the excess waters of the Sacramento River to the San Joaquin Valley; and that these developments should be undertaken step by step in accordance with a comprehensive program. Federal and State authorities have examined numerous feasible reservoir sites and are agreed that, considering the present needs and the cost, the Kennett site on the Sacramento River and the Friant site on the San Joaquin River are first and second respectively in order of importance and priority. The Kennet Reservoir would serve the combined purposes of navigation, flood control, power de-

velopment, irrigation, and salinity control, *while the Friant Reservoir would serve chiefly power development and irrigation.*" (p. 8.) (Italics ours.)

"20. Friant Reservoir.—For the relief of the area in the southern part of the San Joaquin River, where pumping has depleted the ground water reserves to an extent which jeopardizes some 200,000 acres of valuable and fertile land, it is proposed to construct a storage and diversion dam at Friant on the San Joaquin River and a canal 165 miles long to the vicinity of Bakersfield on the Kern River. The reservoir would have a useful storage capacity of 270,000 acre-feet. In addition to supplying water to the area referred to, this reservoir would also furnish water by canal to lands in the Madera irrigation district, which also has at present a deficient supply. The development of a small amount of hydroelectric power is contemplated in connection with this project. The estimated cost of the project is as follows:

Reservoir and water rights	$17,419,000
Bakersfield Canal	27,826,500
Madera Canal	2,500,000
Power plant	1,445,000
Total	$49,190,500

"It is estimated that this project would produce 600,000 acre-feet of water annually for which the farmers in the area needing relief can afford to pay on the average about $2.50 per acre-foot, or a total of $1,500,000 annually. It is claimed that the profits from local business, the local tax returns, and other indirect local benefits resulting

from the retention of this land in cultivation, are worth about an equal amount, thus bringing the total estimated irrigation benefits to $3,000,000 annually." (p. 10.)

"26. *The Friant project will not benefit navigation, and no Federal contribution to that project appears justified.*" (p. 13.) (Italics ours.)

ated, San Francisco, California,
September 28, 1949.

Respectfully submitted,

EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondents.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1947

No. [illegible]

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] BEACH LIVE STOCK COMPANY, a Corporation,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. SHELDON POTTER,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] REBECA,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] JAMES A. REDPATH, a Corporation,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ARCHIBALD F. STEPHENS,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] LAS SECURITIES COMPANY,

Defendant.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington, Amici Curiae.

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IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 229-304

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GERLACH LIVE STOCK COMPANY, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

J. SHELDON POTTER.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

MARTIN ERRECA.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

JAMES J. STEVINSON, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARCHIBALD J. STEVINSON.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

3-H SECURITIES COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington, Amici Curiae.

Interest of Amici Curiae.

Amici curiae are states in the arid and semi-arid West. Their interest is that of *parens patriae*. They are concerned lest the stability of the economic structure of their irrigated agriculture be upset by a decision supporting Petitioner's claims. It appears to them that the logical extension of Petitioner's theory that the water rights in the cases at bar may be destroyed without compensation would permit the United States to confiscate at will, and redistribute, any water rights, riparian or appropriative, on any stream which under the decisions of this Court is subject to the constitutional authority of Congress in aid of navigation. These states appear because they consider such a rule would be destructive of their prosperous communities which are founded on irrigated agriculture, would be inherently unjust, and would not be in conformity with the law.

Opinions Below and Jurisdiction.

These are adequately covered by the Petition (p. 2). (*Amici curiae* are unable to cite herein Petitioner's main brief, inasmuch as it was not filed February 7th, in accordance with Rule 27, subdivision 1.)

Statement of the Case.

Amici curiae assume that statements of the case made by Petitioner, Respondents and other *amici curiae*, are correct and adequate.

Questions Argued.

I.

All present *amici curiae* are interested in the following question:

1. Whether riparian rights to the use of water of a navigable river in the West, if taken by the United States for public use, are or are not compensable.

Amicus curiae, State of California, alone, has a special interest in the following question:

2. Whether the opinion of the Court of Claims or the briefs of the parties correctly state the effect of the 1928 Amendment to Article XIV, Section 3, of the California Constitution.

Summary of Argument.

I. THE WATER RIGHTS INVOLVED IN THE CASES AT BAR ARE VESTED PROPERTY RIGHTS AND ARE COMPENSABLE UNDER THE FIFTH AMENDMENT.

II. THE OPINION OF THE COURT OF CLAIMS BELOW DOES NOT ADEQUATELY STATE THE EFFECT OF THE AMENDMENT OF 1928 TO ARTICLE XIV, SECTION 3, OF THE CALIFORNIA CONSTITUTION.

I.

The Water Rights Involved in the Cases at Bar Are Vested Property Rights and Are Compensable Under the Fifth Amendment.

In the western one-third of the United States the total precipitation of rain and snow, if fully conserved and put to use, is only enough for the irrigation and domestic uses of four per cent of the land. This block of states between Kansas and the Pacific Coast, Canada and Mexico, a region 1,000 miles wide and 2,000 miles long, is the arid and semi-arid West. These facts are drawn from an official publication of the Department of the Interior ("Conservation in the Department of the Interior," Wilbur and DuPuy, 1932, pages 1-2), in which it is said:

> "In two-thirds of the Nation water and to spare is always available. Little thought need be taken of it. But in the West it is the one element by which development is measured, and it will remain so through all the years to come. Water is life beyond meridian 100."

In most of the West no crops can be raised, human beings cannot exist and even wild life is scanty, without artificially conserved and controlled water supplies. On the other hand, where irrigation has been made possible, land theretofore growing only sagebrush, greasewood and cactus has been transformed, by reason of the native fertility of the soil and the dependability and regularity of controlled irrigation, to the production of crops on a scale even greater than that of the lands in the humid East. Fruitful oases, separated commonly by scores or hundreds of miles of barren deserts, now are scattered through the West. And, except for such further development as is

possible within the limits of the scanty precipitation, this is the whole agricultural heritage of the West.

Just 100 years ago, when the 17 western states were barren, vacant and unoccupied, save by small bands of roving Indians and a few white fur trappers, a great mass migration took place from the eastern states to California. In the Gold Rush of 1849, hundreds of thousands made their way across the plains, over the Isthmus of Panama, or around Cape Horn, to seek gold in the canyons of the Sierra Nevada. They found that the first requirement of placer mining was water with which to separate gold from sand in miners' pans or sluice boxes. Immediately, therefore, works for diversion and transportation of water, first rudimentary, then more elaborate, were undertaken. Dams for reservoirs, and miles of ditches and flumes were constructed by individuals or mining companies.

The pioneer miners rapidly crystallized rude social institutions, including miners' courts, mining district organizations, and rules of property, arising, *ex necessitate*, out of conflicts which had arisen among them. The cardinal principle of these rules was that the first taker of water from a stream acquired a right to the use of the water—in the classic phrase—"first in time is first in right." Very shortly the Supreme Court of California recognized these "customs of miners" in *Irwin v. Phillips* (1855), 5 Cal. 140, 63 Am. Dec. 113. The Court said (p. 146):

> "If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of

res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development."

This was written in spite of the fact, not mentioned by the Court, that the first Legislature of California had adopted the common law of England as the rule of decision in California (Cal. Stats. 1850, p. 219). (*Cf. Reno S. Works v. Stevenson,* 20 Nev. 269, 21 Pac. 317.)

The customs of miners in relation to appropriation of water were soon confirmed by the Act of Congress of July 26, 1866 (14 Stat. 251, R. S. Sec. 2339, 43 U. S. C. Sec. 661) which provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

As the placer mines were gradually worked out, the use of water went through the transition from mining to agriculture. Also, as pioneer settlers spread through the West and occupied those valleys where fertile land and water existed in convenient juxtaposition, there rapidly spread through the 17 western states a recognition of the practical necessity of a system of appropriative water rights.

This followed, because under the climatic conditions existing in most of the West, application of the correlative right of all riparian owners under the common law rule imposed on settlers a strait-jacket, in which no one could get enough water for his needs. Only by the appropriative system could whole streams be diverted from their beds and made the foundation of large and permanent agricultural development. Each of the states in turn, by statute or decision, established the peculiar institution of western water rights, either exclusively by appropriation, or, in the case of California and some others, by appropriation, existing concurrently with the common law riparian right.[1]

In each of the seventeen western states, the conditions of the Act of 1866, that the appropriative rights be vested rights and be "recognized and acknowledged by the local customs, laws, and the decisions of courts," have been fully and aptly satisfied. At the same time the states in the eastern and western tiers (Washington to California and North Dakota to Texas), nine in all (*Peabody v. Vallejo*, 2 Cal. 2d 351, 365), have recognized the existence, in some form, of riparian rights. Each of these

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[1]In California the combined system was recognized in the great case of *Lux v. Haggin* (1886), 69 Cal. 255.

rights, whether riparian or appropriative, is real property; is vested; is protected by the courts by injunction or judgments for damages; if taken for public use, is compensable; each of them is recognized to be the ownership of a usufructuary right, not the ownership of the stream itself or the water therein, but of the continuing right to use the water. The riparian right, in California, is more than an easement; it is part and parcel of the land.

Lux v. Haggin, 69 Cal. 255, 264, 390, 391-394;

Herminghaus v. So. Calif. Edison Co., 200 Cal. 81, 95 *et seq;*

Wiel, "Water Rights in the Western States," 3rd Ed., Vol. 1, Sec. 18, pp. 18-21;

25 California Jurisprudence, 1029, Sec. 29.

Just as there is no distinction in the law of waters of the western states between these legal characteristics of riparian and appropriative rights, so also no distinction has been made in the terms or application of the law of most of these states between rights to the use of water of navigable and innavigable streams. The state acts are generally silent on this point.[2] However, perhaps the first appropriations and riparian claims arose on some of the few great rivers of the West, such as the Columbia, Missouri, Sacramento-San Joaquin and Colorado, and their major tributaries. This, naturally, occurred because of

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[2]It is said that a few states, *e.g.*, South Dakota, Washington, and perhaps Nebraska, have by statute or decision limited either appropriative or riparian rights to innavigable waters. Whatever the rationale, mistaken deference to supposed federal supremacy or otherwise, it is not believed that these deviations impair the general rule.

the volume and dependable flow of these streams and the fact that they coursed through large arable valleys.

Wiel, "Water Rights in the Western States," 3rd Ed., Vol. 1, Sec. 339, p. 360 and cases cited;

In re Crab Creek & Moses Lake, 134 Wash. 7, 235 Pac. 37;

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535;

Los Angeles v. Aitken, 10 Cal. App. 2d 460, 468, 52 P. 2d 585;

Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758; error denied 93 Tex. 679.[3]

The Act of 1866 was general in its terms, not limited either to navigable or innavigable streams. It permitted development to proceed upon the only lines which were economically practicable. Under it, and under the succeeding Desert Land Act of 1870,[4] the development of the West proceeded under the private initiative of the pioneers and without substantial governmental participation until, in 1902, the Reclamation Act was adopted and the United

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[3]For brief historical reviews of the rise of the law of waters in California, reference is made to "The California Irrigation Right," R. S. Hess, 5 Cal. Law Rev. 142, and "The Development of the Law of Waters in the West," Chief Justice Lucien Shaw of California, 10 Cal. Law Rev. 443 (reprinted in 189 Cal. 779), in which latter some reference is made (p. 453 *et seq.*), to the initiation of the holdings of Miller & Lux in the San Joaquin Valley, which led to the decision in *Lux v. Haggin*, *supra*, and which are the subject of the cases at bar.

[4]16 Stat. 217, which specified that all patents to public lands should be "subject to any vested and accrued water rights" under the Act of 1866, but which was limited by its express terms to innavigable streams.

States commenced to finance and construct irrigation works in the 17 western states.[5]

Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 390), provides:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

This section broadens greatly the recognition by the United States of the integrity of state water laws, in that it is not confined, as was the Act of 1866, to the recognition of water rights appropriated upon public lands nor, as was the Desert Land Act, to innavigable streams. It is to be noted that Section 8 above is not limited by its terms either to innavigable or navigable streams, although in some references it has been assumed to be limited to innavigable streams.

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[5]Texas was added to the original 16 states by Acts of Feb. 25, 1905 (33 Stat. 814) and June 12, 1906 (34 Stat. 259).

Although the Act of 1902, while covering broadly the field of Federal reclamation, did not contain specific reference to navigable streams, nevertheless, the provision in Section 8 that "nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof" strongly indicates that the framers of the act had in mind the protection of rights of "any landowner, appropriator, or user of water" in navigable streams. The great interstate streams of the West, to which this clause is applicable, are almost without exception navigable. The Columbia, the Missouri and the Colorado are typical interstate streams of the West. Each has been found to be to some extent navigable and subject to the Federal power to improve navigation.[6]

Considering the obvious necessity that the settled and developed projects in the West maintain the sanctity of their indispensable water rights, it is easy to understand that, much as the West desired Federal development, the Act of 1902 could not have been adopted had it not fully and emphatically protected the existing homes and farms of the pioneers.

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[6] *Columbia:*
Continental Land Co. v. United States, 88 F. 2d 104 (Cert. den. 302 U. S. 715).

Missouri:
Act of May 18, 1938 (52 Stat. 403—Fort Peck, Montana, Project).

Colorado:
United States v. Utah, 283 U. S. 64, 89;
Arizona v. California, 283 U. S. 423, 455, 456.

Section 8 was accompanied by a corollary in Section 7, which reads:

> "That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within 30 days from the receipt of the application at the Department of Justice."

The sweeping phrase used in this section "any rights or property" obviously includes not only land and rights of way, but water rights.[7]

By Section 8 of the 1902 Act, the Secretary of the Interior "in carrying out the provisions of this act" is required to "proceed in conformity with" state laws. In order to proceed in conformity with those laws, he has been required, and it has been his regular practice, to obtain water rights by appropriation, purchase or condemnation. The rights so obtained, being subject to state laws, are, inescapably, subject to such prior existing water rights as are recognized by those laws. The rights recognized by the state laws are, in one or another of the states, either exclusively appropriative, or both appropri-

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[7]Congressman Mondell, Committee Chairman in charge of the bill categorically so stated on the floor:

> "Section 7 provides means for acquiring lands and water rights, where same may be necessary." 35 Cong. Rec. 6678.

ative and riparian. In whichever class they fall, the Secretary, in setting up and carrying through a reclamation project, takes subject to and is bound to respect prior rights. This has been the law of the United States for nearly half a century. This circumstance has been frequently referred to in the decisions of this Court. In *Nebraska v. Wyoming,* 295 U. S. 40, on motion to dismiss, the Court says, at page 43:

> "The bill alleges, and we know as matter of law (citing Section 8 of the Act of June 17, 1902, 32 Stat. 390) that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him."

See also:

Nebraska v. Wyoming, 325 U. S. 587, 614, 629;

Mason Co. v. Tax Commission, 302 U. S. 186, 199;

Ickes v. Fox, 300 U. S. 82, 93, 94, 95;

Ide v. U. S., 263 U. S. 497, 499.

As he has proceeded with the development of the reclamation program, the Secretary of the Interior has regularly and fully, in innumerable instances, reported to the Congress that he has conformed to the rules established by Section 8 of the 1902 Act, and Congress has acted in the light of that information.

The Central Valley Project, California was "reauthorized" by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 834, 850). That act declared that, except as otherwise provided, "the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals . . . and incidental works deemed necessary to said entire project." This reauthorization under the reclamation laws was reiterated in Section 2 of the Rivers and Harbors Act of October 17, 1940 (54 Stat. 1198, 1199), which added the authority for the "construction under the provisions of the Federal reclamation laws of such distribution systems" as were necessary to the project. So, the Secretary, in carrying on the Central Valley Project under the reclamation laws, must abide by Section 8 and the water rights he obtains, from whatever source, are subject to all prior rights which are vested under the State law of California.

The next act by which the policy of the United States has been established and declared with respect to navigable streams is Section 1(b) of the Flood Control Act of 1944 (Act of Dec. 22, 1944, 58 Stat. 887) which reads:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian, shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

By this section, the policy of the United States is broadly declared as to projects authorized by the act in the West.[8] The Federal power to improve navigation in the West is positively subordinated, so that it shall not conflict with the consumptive uses of water, such as domestic and irrigation use. The same provision has been repeated in each of the Flood Control and Rivers and Harbors Acts adopted since 1944. The provision evidences a realistic acceptance by the Congress of the prime necessity of devoting to consumptive uses in the western states all of the waters which can be so applied. The Congress has thereby indicated its plain intention that in the 17 western states the navigation power, whether or not in the absence of such a statute it might, shall not override the consumptive uses, which are the indispensable prerequisite of the existence of any substantial civilization in the western states.

Amici curiae have herein reviewed, without elaboration of detail, some high points of western water law and the Acts by which Congress has recognized rights to use of water for consumptive purposes under that law. The main question now appears to boil down to this: Is the rule of the *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the correct rule to apply to consumptive water rights on navigable streams in the West?

If so, respondents are out and injured. And while their private fortune is of no interest to anyone but themselves, the establishment of such a rule by this Court would be of most intense concern to the thousands upon thousands of water users in every State in the West,

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[8]Nine of these projects are located within the Central Valley Project area.

who have believed themselves shielded by the Acts of Congress and justified in their labors and expenditures in building their irrigated farmsteads. These thousands would now find themselves in jeopardy.

If not, then water users in the West can with confidence pursue the development of their lands, with the knowledge that if public necessity requires that they be dispossessed, they are entitled to just compensation.

Amici curiae consider that one of the recent decisions of this Court, which follows the *Chandler-Dunbar* case, contains the key to the problem. In *United States v. Willow River Power Co.*, 324 U. S. 499, the reasoning of the Court shows clearly why the *Chandler-Dunbar* rule does not apply to consumptive rights to water in the West. The Court says, at page 502:

> "The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."

The Court says further:

> "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the

> right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests."

Amici curiae suggest that no Act of Congress has given anything other than conditional or temporary protection to the use for power production of waters of navigable streams in the East. That was the "right" asserted by the riparian owners in the *Chandler-Dunbar* and subsequent cases.

On the other hand, Congress has repeatedly and unequivocally, in the Act of July 26, 1866, the Reclamation Act of June 17, 1902, and the Flood Control Act of 1944, given express protection and recognition to Western irrigation and domestic water rights. Those rights which are vested according to the laws of the Western States are, by the law of the United States, to be respected. In Mr. Justice Jackson's words they "have the law back of them." They are "legally protected." They are, therefore, "property rights." The Secretary of the Interior, whether he might wish to, or not, cannot carry out reclamation work under the Act of 1902, except in conformity with the law of the State and subject to prior rights vested by the law of the State. That, this Court said in *Nebraska v. Wyoming*, 295 U. S. 40, 43, "we know as matter of law."

What is the result? There is shown to be present a vested property right, not the "qualified" title described in the *Chandler-Dunbar* case. This vested property right is, then, within the protection of the Fifth Amendment and "cannot be taken without just compensation."

The case of *New Jersey v. New York*, 283 U. S. 336, involved an Eastern stream. Nevertheless the classic remarks of Mr. Justice Holmes therein (p. 342) illuminate any consideration of the use of the rivers of the West:

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

So, *amici curiae* cannot too strongly emphasize the incalculable values to the civilization of the Western states of the use of the Western rivers for irrigation and domestic purposes. The land, without water, is generally of little or no value. The western third of the United States must, within the rigid limitations imposed upon it by nature, produce and continue to develop the production of its own food supply and its contribution to the food supply of the Middle West and East. It must continue to provide adequate reserves of domestic water for its rapidly growing urban centers. The Congress has faced this problem realistically and has acted in a wise and far-seeing way to establish a sound public policy. Should the contentions herein made by the Executive prevail, disruption of values of property and of confidence in the Federal government among the countless water users of the 17 Western states would ensue. Under no circumstances should this Court allow the Executive to divert the policy of the nation from that which Congress has declared.

II.

The Opinion of the Court of Claims Below Does Not Adequately State the Effect of the Amendment of 1928 to Article XIV, Section 3, of the California Constitution.

The State of California is the only one of present *amici curiae* which is interested in this point. It desires that the record be kept straight, and that this Court be informed as to the official views of California concerning the meaning and effect of the 1928 Amendment. It is considered that the opinion of the Court of Claims does not fully nor adequately state the effect of the 1928 Amendment.

In the actions at bar the defendant United States is an appropriator and the plaintiffs are riparian owners of lands bordering on overflow channels of the San Joaquin River, which lands are situate down stream from the point of appropriation, Friant Dam. Exactly the same river, the same relative position of the parties, and the same type of use (flood irrigation of pastures) were present in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, Cert. dismissed 275 U. S. 486. The California court there held that plaintiff's land was riparian, that the use of annual floods for irrigation by overflow was a reasonable, beneficial use, and that as between a riparian owner and an appropriator, the riparian was not limited by any rule of reasonableness.

The 1928 Amendment to Article XIV, Section 3, was directed against this latter part of the decision. The arguments officially submitted to the voters at the election held November 6, 1928, at which the Amendment was adopted, stated in part as follows:

> "This amendment to the state Constitution affects all of the people in this state, those in the cities as well as those in the country.

"Its purpose is to prevent the waste of the waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea.

"It allows water which now so runs to waste to be conserved and used for the benefit of all of the people in the state . . .

"While this amendment protects all water rights to the full extent to which they can be put to reasonable beneficial use in some reasonable way, and this includes the riparian owner as well as others, nevertheless it is an effort on the part of the state, in the interest of all of the people of the state, to conserve our waters. It will change the present theory of the law that now permits the unused, unrestrained and undiminished flow of our streams to the sea to be interpreted as a beneficial use of the water in this semiarid state, where all lands, including riparian lands, need artificial irrigation in summer and fall, and all our cities need stored water for domestic use.

"Under present interpretations the riparian owner is not bound by any rule of reasonableness in the use of water.

"For example, in the Herminghaus case it was held that approximately 97 per cent of the water of the streams should flow by the land, in order that 3 per cent might be used for irrigation.

"The development of California requires that a different rule from this be adopted. The amendment preserves to the riparian owner all the water to which he may be entitled for beneficial use by reasonable methods of use, but requires that the unwarranted and needless waste of water should be prevented.

"This is a common sense rule of the utmost importance to, and should be adopted for, the future growth of our state and cities."

It is settled in California that such argument may be resorted to in order to resolve doubt as to proper construction of measures voted by the electors.

Chow v. Santa Barbara, 217 Cal. 673, 700;

Turlock Irrigation District v. White, 186 Cal. 183, 184, 187.

Following the Amendment, the California court, applying it, has repeatedly reversed, in whole or in part, judgments which followed the *Herminghaus* case and enjoined appropriators.

Peabody v. City of Vallejo, 2 Cal. 2d 351;

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489;

Lodi v. East Bay Municipal Utilities District, 7 Cal. 2d 316;

Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677;

Rancho Santa Margarita v. Vail, 11 Cal. 2d 501.

In *Chow v. City of Santa Barbara*, 217 Cal. 673, 700, the first California decision interpreting the constitutional amendment, and in the foregoing cases, it is made clear that the constitutional amendment condemns wasteful flow of water to the ocean. The particular waste condemned is that indicated in the text of the above quoted argument to the voters, which states that the purpose is "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea."

The cases under review are radically different from the most of the above cases, in that no issue relating to injunctions is involved. One of those cases, however, was remanded with directions to fix the value of the riparian

right and is, therefore, of peculiar interest here. (*Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677.) That value, naturally, has been depreciated by the constitutional amendment, due to the limitations thereby imposed, particularly in connection with the restrictions upon issuance of injunctive process to enforce the right. This element runs through all the cases herein cited which have construed the effect of the Amendment. The right itself, however, still exists. For example, in *Peabody v. Vallejo*, 2 Cal. 2d 351, 374, the court says:

> "There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, . . . are entitled to the protection of the courts at law or in equity . . . If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands."

Again in the conclusions stated in the opinion, the court says, at page 383:

> "That if, as to any plaintiff, no substantial damages be proved, but a paramount or preferential right be shown, he is entitled . . . to compensation for the extinguishment of the paramount right . . .; that if substantial damages result to the plaintiffs or any of them by reason of the continuance of the defendant's enterprise, taking into consideration the tests to be applied in the conservation and reasonable use of water now required by the law, such plaintiffs are entitled to the ascertainment of such damages . . ."

In the *Herminghaus* case, it was held that the riparian right extends to all ordinary flows, except extraordinary flood flows. (200 Cal. 81, 100.)

In the *Peabody* case, *supra*, at pages 365, 368, it is held this distinction between extraordinary and other flood flows no longer exists.

Thus, to the extent the riparian owner needs the water for reasonable beneficial use, his right extends to the entire flow of the stream.

In *Meridian Ltd. v. San Francisco*, 13 Cal. 2d 425, at page 445, it is said:

> "In the cases referred to it was established that by the changes in the law the right to use the waters of rivers and streams of the state has been limited to a reasonable beneficial use; that the riparian owner has a prior and paramount right to this use and if necessary is entitled to the full natural flow of the stream or its equivalent undiminished in quantity and unimpaired in quality. The riparian owner is safeguarded in this right by the constitutional amendment. But the amendment also provides that 'riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section . . .' This provision clearly means that when the law has guaranteed to the riparian owner the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes, and has made available to him the means of protecting the rights so guaranteed he has received the full measure of benefit and protection to which he is entitled and can claim no more."

It is incumbent upon the riparian owner to show what quantity of water he needs for reasonable beneficial use on his riparian land. The question is one of fact, and the trial court should make a finding thereon. (*Tulare*

Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489.) To the extent the riparian owner claims the right to maintenance of the full flow of the stream to make water available to his land, he also has the burden of establishing that that constitutes a reasonable method or means of use, and the court should make its finding thereon.

If the court were to find the claimed means of use to be unreasonable, it would not necessarily follow that the riparian right no longer existed, or was of no value, for the Court in appraising the riparian right must consider all possible present and reasonably prospective future uses for which the land is, or may be adapted.

Peabody v. Vallejo, supra;

Meridian, Ltd. v. San Francisco, supra.

If the claimed means of use be found unreasonable, possibly others could be devised which would not be.

The case at bar involves, not injunction, but evaluation of a riparian right in terms of money. In such a case it is not incumbent upon the defendant to "devise some physical solution" whereby the plaintiff's needs can continue to be satisfied, but the defendant may advance such a physical solution if it so desires for the purpose of minimizing damages, or to avoid them entirely. It is under no "obligation" to do so.

Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677.

In the cases at bar, the defendant advanced no such solution and, therefore, a discussion of the physical solution, is, for present purposes, irrelevant. It is only in cases where the defendant chooses to advance a "physical

solution" as a means of mitigating or avoiding damages that this factor becomes material. The Court of Claims, therefore, was slightly inaccurate in saying that the plaintiffs "had the right to demand" that the defendant provide a physical solution.

76 Fed. Supp. 87, 95.

However, except for this inaccuracy, the State of California sees nothing in the decisions of the Court of Claims herein which conflicts with the decisions of the Supreme Court of California as to the effect of the Constitutional Amendment of 1928 to Article XIV, Section 3, of the California Constitution. So far as the Constitutional Amendment is concerned, the decisions of the Court of Claims seem to be the normal and natural application of the law as developed by the California courts since the 1928 Amendment.

In the consideration of this subject, it should at all times be realized that the United States is, in this case, in the position of an appropriator of water at Friant Dam, subject to the application of the laws of California with respect to water rights. (Sec. 8, Act of June 17, 1902, 32 Stat. 388.) It does not hold title to its appropriated rights at Friant Dam in any personal capacity, nor in any sovereign capacity as of its own right. It holds those rights only as trustee for the benefit of the Central Valley Project. The beneficial ownership of those rights belongs, as is settled, to the water users on the Central Valley Project, and the United States is only a storer, carrier and distributor of the water, not the owner of the water right.

Ickes v. Fox, 300 U. S. 82, 93, 94, 95;

Nebraska v. Wyoming, 325 U. S. 587, 614.

Accordingly, considerations drawn from the character and powers of the United States, as a sovereign, should not be permitted to color the picture.

Conclusion.

For the reasons set out above, the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington submit that the decision below should be affirmed.

February 16, 1949.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of California.

ARVIN B. SHAW, JR.,
Assistant Attorney General of California,

ROBERT E. SMYLIE,
Attorney General of Idaho,

EDWARD F. ARN,
Attorney General of Kansas,

JAMES H. ANDERSON,
Attorney General of Nebraska,

ALAN BIBLE,
Attorney General of Nevada,

JOE L. MARTINEZ,
Attorney General of New Mexico,

NELS G. JOHNSON,
Attorney General of North Dakota,

GEORGE NEUNER,
Attorney General of Oregon,

SIGURD ANDERSON,
Attorney General of South Dakota,

SMITH TROY,
Attorney General of Washington.

Of Counsel:

GILBERT F. NELSON,
Deputy Attorney General of California.

HENRY HOLSINGER,
Principal Attorney, Division of Water Resources of California.

NORTHCUTT ELY,
Special Counsel, Colorado River Board of California.

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IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

Nos. ~~[illegible]~~ 4 - 9

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GERLACH LIVE STOCK COMPANY, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

J. SHELDON POTTER.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

MARTIN ERRECA.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

JAMES J. STEVINSON, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARCHIBALD J. STEVINSON.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

I-H SECURITIES COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF IRRIGATION DISTRICTS ASSOCIATION OF CALIFORNIA—AMICUS CURIAE.

IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 229-304

UNITED STATES OF AMERICA, *Petitioner,*

vs.

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J. SHELDON POTTER.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

MARTIN ERRECA.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

JAMES J. STEVINSON, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARCHIBALD J. STEVINSON.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

3-H SECURITIES COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF IRRIGATION DISTRICTS ASSOCIATION OF CALIFORNIA—AMICUS CURIAE.

Interest of Amicus Curiae.

Irrigation Districts Association of California is a voluntary association of 120 irrigation districts and other water districts organized under the California Irrigation District Act (Div. XI, Water Code of Cal.) and similar statutes. They are public agencies of the State. They range in size from as small as 800 acres to as large as 900,000 acres, there being 13 member districts exceeding 100,000 acres each in area. The principal function of these districts is to conserve, provide and distribute water for irrigation of agricultural land within their boundaries.

About 40 of the member districts are located in the Central Valley of California. Most of them now hold water rights by appropriation or riparian title to waters of the San Joaquin and Sacramento Rivers and tributaries thereof. These water rights, in some instances, originated from 70 to 90 years ago. The 40 districts lie within the project area of the Central Valley Project, and are beneficiaries of the project, and most of them expect to receive benefits from the project by way of regulation of the streams, or increased water supply, or both.

The members of this Association comprise within their boundaries in the aggregate over 4,000,000 acres of irrigated land out of the 6,000,000 acres of irrigated land within the State of California. These 4,000,000 acres are occupied and farmed by, and are the source of livelihood of, over 3,000,000 people out of the 10,000,000 people now living in California. Hundreds of millions of dollars have been expended by the districts for works connected with water supply and additional hundreds of millions have been expended by the farmers for the improvement of their lands for irrigation and farming.

The Association and its member Districts understand the claim of the United States in the cases at bar to be that, because of the constitutional authority of the United States over commerce, the United States may, at will and without liability, confiscate any existing water rights upon the San Joaquin and Sacramento Rivers and redistribute them among such beneficiaries of the project as it may choose.

Whether individual irrigation district members of the Association would be benefited or harmed as a result of the claim made herein by the United States that it can destroy water rights on a navigable stream without compensation, this Association and its members regard such a claim as having deep-seated and destructive consequences to the economy of irrigated agriculture in California and consider such claim to be unjust and not in accord with the law as declared by the Congress of the United States.

The Solicitor General by letter of January 14, 1949, and the respondents by letter of February 7, 1949, have consented that this Brief, *Amicus Curiae*, be filed; the two letters have been deposited with the Clerk.

Opinions Below and Jurisdiction.

These are adequately covered by the Petition (p. 2).

Statement of the Case.

Amicus Curiae assumes that the statements of the case made by Petitioner and Respondents are correct and adequate.

Argument.

To conserve the time of the Court, this *Amicus Curiae* concurs in and adopts the argument made in Brief of the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington, as *Amici Curiae,* herein filed.

Conclusion.

Amicus Curiae respectfully submits that the decisions below should be affirmed.

Dated February 18, 1949.

HARRY W. HORTON,
El Centro, California,

P. J. MINASIAN,
Oroville, California,

W. R. BAILEY,
Visalia, California,

RONALD B. HARRIS,
Fresno, California,

ARVIN B. SHAW, JR.,
Los Angeles, California,

Attorneys for Irrigation Districts Association of California,

Amicus Curiae.

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No. ~~299~~ 304

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UNITED STATES OF AMERICA, *Petitioner*
v.
JAMES J. STEVINSON, A CORPORATION

UNITED STATES OF AMERICA, *Petitioner*
v.
ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*
v.
3-H SECURITIES COMPANY

On Writs of Certiorari to the Court of Claims

BRIEF FOR GILL, ET AL., AMICI CURIAE

MILTON T. FARMER
Balboa Building
San Francisco, Cal.
WARNER W. GARDNER
Hibbs Building
Washington, D. C.

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IN THE

Supreme Court of the United States

October Term, 1948

Nos. 299 - 304

UNITED STATES OF AMERICA, *Petitioner*
v.
GERLACH LIVE STOCK COMPANY, A CORPORATION

UNITED STATES OF AMERICA, *Petitioner*
v.
J. SHELDON POTTER

UNITED STATES OF AMERICA, *Petitioner*
v.
MARTIN ERRECA

UNITED STATES OF AMERICA, *Petitioner*
v.
JAMES J. STEVINSON, A CORPORATION

UNITED STATES OF AMERICA, *Petitioner*
v.
ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*
v.
3-H SECURITIES COMPANY

On Writs of Certiorari to the Court of Claims

BRIEF FOR GILL, ET AL., AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are plaintiffs in four cases pending in the Court of Claims: *Gill* v. *United States*, No. 48817, *Arnold* v. *United States*, No. 48818, *Buchenau* v. *United States*, No. 48821, and *Thompson* v. *United States*, No.

48822. Those cases present issues in most respects identical and in all respects similar to those now before this Court. The Solicitor General, by letter of January 24, 1949, and counsel for the respondents, by formal consent received January 21, 1949, have consented that this brief *amicus curia* be filed; those documents have been deposited with the Clerk.

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer is reported in 102 C. Cls. 392, and its opinions after trial (R. 130, 191) in 76 F. Supp. 87, 99.

JURISDICTION

Judgments in Nos. 302-304 were entered on March 1, 1948 (R. 192) and a motion for new trial denied on June 1, 1948 (R. 193). Mr. Justice Jackson on August 20, 1948, extended the time in which to file a petition for writs of certiorari to and including September 28, 1948 (R. 193). Judgments in Nos. 299-301 were entered on April 5, 1948 (R. 146-147) and a motion for new trial denied on June 28, 1948 (R. 147). A petition for writs of certiorari was filed on September 24, 1948, and was granted on December 6, 1948. The jurisdiction of this Court rests on 28 U. S. C. sec. 1255.

QUESTIONS PRESENTED

1. Whether the reclamation laws and the Central Valley Project legislation contemplate the purchase or the uncompensated seizure of the riparian rights to the irrigation use of the waters of the San Joaquin River which were taken by the United States for the purpose of sale for the irrigation of non-riparian lands.

2. Only if the first question be answered against the respondents, does the Court reach the major issues presented by the Solicitor General:

(a) Whether Friant Dam, Millerton Lake, and the Friant-Kern and Madera Canals were authorized and constructed in order to irrigate non-riparian lands or to aid navigation and commerce.

(b) Whether the Government may seize the riparian rights to the irrigation use of navigable waters in the arid states, for the purpose of sale for the irrigation of non-riparian lands, without the payment of just compensation.

3. Whether the court below erred in fixing October 20, 1941, as the date of the taking.

4. Whether the riparian rights to irrigation by the overflow waters of the San Joaquin River were destroyed by Section 3 of Article XIV of the California Constitution, adopted in 1928.

5. Whether the deed, from Miller & Lux, Inc. to Gerlach Live Stock Co. and Martin-Erreca (Nos. 299, 301) gave the grantees riparian rights which were protected against their subsequent sale to the United States by the grantor.

Amici curiae have no interest in the remaining questions presented by the Solicitor General: the effect of the Miller & Lux deeds involved in Nos. 300, 302-304, and the comparative particularity of the findings of the Court of Claims in the cases at bar.

STATUTES INVOLVED

Section 8 of the Reclamation Act and the Acts of August 26, 1937, and October 17, 1940, are set out in the Government's Brief (81, 4, 6).

STATEMENT

1. The Project. The Central Valley of California reaches from Redding in the north to Bakersfield 400 miles to the south. Its main water-courses are the Sacramento and the San Joaquin Rivers which flow together a few miles east of Suisun Bay, the northeastern part of the Bay of San Francisco. Both rivers are here assumed to be navigable. The Sacramento River carries about twice the water volume of the San Joaquin, and the San Joaquin Valley contains about twice the irrigable land found in the Sacramento Valley.[1] The grand purpose of the Central Valley Project is to transfer the excess water of the Sacramento to the southern part of the Central Valley.[2]

Both the United States and the State have for a very long time been engaged in investigation and planning for the Central Valley improvements. After a series of detailed studies and investigations by state and Federal agencies, the State enacted the Central Valley Project Act of 1933, calling for state construction of the project, with federal aid. Cal. Stats. 1933, p. 2643.[3] The State was not successful, however, in obtaining a grant from the Public Works Administration and in May 1935 the Bureau of Reclamation applied for an allotment for a federal project under the Emergency Relief Appropriation Act of 1935; this was made in September 1935.[4]

The decision in *United States* v. *Arizona*, 295 U. S. 174, cast considerable doubt on the validity of commencing the work under an F. E. R. A. allocation and the project was accordingly authorized under the federal reclamation laws

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[1] Central Valley Federal Reclamation Project, Feasibility Report of Secretary of Interior, H. Doc. No. 146, 80th Cong., 1st sess., p. 8.

[2] *Ibid.*, p. 2.

[3] See Montgomery and Clawson, History of the Central Valley Project (U. S. Dept. of Agriculture, Bur. of Agric. Econ., Berkeley, Cal., 1946), pp. 9, 21-37, 46-64, 270.

[4] *Ibid.*, pp. 71-81.

by letter of the Secretary of the Interior, dated November 26, 1935, approved by the President on December 2, 1935 (R. 91-93; Rsp. Br. App. i-x). In order to accomplish a transfer of funds from the Corps of Engineers, the project was reauthorized under the reclamation laws by the Act of August 26, 1937. This Act was in turn amended, in respects not important here, by the Act of October 17, 1940.

The project in its present form rests upon the Shasta and Friant dams. Shasta Dam and Reservoir (aided by the re-regulating dam and reservoir at Keswick) will regularize the flow of the Sacramento, thus aiding navigation and salinity control, and will produce large amounts of electric power. The Delta Cross-Channel will carry the excess water of the Sacramento to a point on the San Joaquin near Tracy, south of Stockton. From there it will be pumped through the Delta-Mendota Canal to Mendota and released down the San Joaquin. This transfer makes possible the use of the San Joaquin waters to irrigate other lands. Accordingly, Friant Dam and Millerton Lake have been constructed at Friant, where the San Joaquin flows into the Central Valley. The dam will impound substantially the entire flow of the San Joaquin and divert it into the Madera Canal (1500 cfs), running 37 miles northwest toward Merced, and into the Friant-Kern Canal (4000 cfs), running 160 miles southeast to Bakersfield and the Kern River.[5] The 40-mile stretch of the San Joaquin between Friant and Mendota will be dry except for occasional spillages needed to provide flood control storage (R. 91-94).

The project from its beginning has contemplated the replacement or purchase of the appropriative and riparian rights along the San Joaquin which would be destroyed by the impoundment and diversion at Friant Dam. Beginning in the summer of 1939 the United States, through

[5] See Central Valley Reclamation Project, *op. cit.*, n. 1, pp. 12-14

the Bureau of Reclamation, has made extensive purchases of these riparian rights. (See *infra*, pp. 29-33).

Construction of Friant Dam commenced on November 3, 1939 (R. 99). No substantial impoundment of the water occurred until October 20, 1941, when the flow of the river was cut off for three weeks and 17,400 acre-feet impounded (R. 100-101). In the winter of 1942 a temporary impoundment resulted from the fact that a high flow of water exceeded the capacity of the dam outlets (R. 101). The Madera Canal was completed in 1944 and storage sufficient to raise the water to its outlet (at 140.4 feet) commenced on February 21, 1944; some 302,600 acre-feet were impounded for the purpose (R. 99, 101). In 1945 the reservoir level was raised to the base of the drum-gates (at 254.4 feet); the total impoundment was then 430,000 acre-feet (R. 99, 101). The drum-gates have not yet been installed, and the Friant-Kern Canal has not yet been completed; no diversions have yet been made into that canal (R. 102).

2. The Lands. Most of the lands involved in these cases border on the main channel of the San Joaquin and all lie within its flood-plain. They are grass lands, used for pasture. There is no controlled irrigation of these lands, but they have been moistened and enriched by the spring over-flow of the San Joaquin (R. 71, 73, 87-88, 110, 113, 127, 161-163, 172-173, 188-190). The rights to this ordinary overflow water are riparian rights, and as to three of the cases have so been adjudicated and protected by a state court decree of 1933[6] (R. 79-81, 108-110, 112-113, 126-127). The riparian rights have a value of $9.00 an acre (R. 96, 110, 113, 128, 188, 190, 191).

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[6] The decree allowed the Madera Irrigation District only the infrequent, extraordinary and unusual flood waters, defined to be those in excess of 20,000 second-feet or 3,000,000 acre-feet per year. The annual overflow on the riparian lands here involved is accomplished by water volumes of a much smaller magnitude (R. 71-72, 81, 85).

The impoundment of October 21, 1941, did not deprive any of these lands of waters which they would otherwise have received (R. 119, 127, 188, 190). The court below made no finding as to the effect upon these lands of the 1942 and 1944 impoundments nor of the continuing operation of the Madera Canal. The lands will not receive any over-flow waters after the Friant-Kern Canal is completed and put into operation (R. 110, 113, 127, 188-189, 190).

The lands of two of the six respondents before this Court (Gerlach Live Stock Co., Erreca, Nos. 299, 301)[7] were purchased from Miller & Lux, Inc. through deeds dated June 20, 1935, and October 20, 1937; each provided (R. 111-112, 125-126):

> * * * the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River * * *. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor * * * against the Grantee * * * to the extent herein provided.

Whatever the meaning and effect of this clause, there was not in fact any possibility that Miller & Lux could use water on its uncontrolled grass lands in such a way as to reduce that available to the respondents (R. 90). There is no evidence of use or plans by any other riparian owner which would affect the rights of the respondents (R. 89).

3. **The Litigation.** The Commissioner of Reclamation in 1939 offered assurance that "the policy of the Gov-

[7] *Amici curiae* have no interest in the sources of title of the other four respondents.

ernment is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam" (Rsp. Br., App. xvi). Promptly after approval of the plan an appraisal board was appointed which fixed the value of the water rights of Miller and Lux grasslands at $13 an acre for controlled irrigation and $9 an acre for overflow irrigation. (R. 95-96). The attorneys for the Bureau of Reclamation appear to have accepted, with precautionary reservations, the claim of Miller & Lux that it had the right under the above-quoted clause, to sell for its own account the riparian rights of the Gerlach and Erreca lands. On July 27, 1939, the United States and Miller & Lux entered into a contract by which: (a) the United States agreed to supply agreed quantities of water to replace the controlled irrigation water used on Miller & Lux crop lands; and (b) the United States paid $2,450,000 for a conveyance of the grassland water rights, used in both controlled and overflow irrigation. (R. 95-96). These rights included the riparian rights of the Gerlach and Erreca lands (R. 97). The contract, however, placed $511,350 of the purchase price in escrow, to reimburse the United States (R. 96-97)—

> In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters * * * wherein it is adjudged that the owners of the lands * * * are * * * deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor * * *

The contract places the United States under a duty to defend any suit and to appeal from any adverse judgment (Rsp. Br., App. xiv). There is no indication in the contract that the United States would recover back any part of the $1,938,650 it has already paid Miller & Lux if it should prevail on the arguments it is now advancing to this Court.

Since the Government thought that the riparian rights in issue had already been paid for, three of the respondents were forced to bring suit in the Court of Claims. The Government and the other three respondents could not agree on the value of their rights. On October 30, 1943, the petition in the Gerlach Live Stock case (No. 299) was filed (R. 1). The Government withdrew its general traverse and on February 17, 1944, filed a demurrer (R. 9); its argument in support took the position that as the San Joaquin River was navigable the Government could take riparian irrigation rights to its waters without compensation. The demurrer was overruled (R. 10). Thereupon a general traverse was filed by the Government and the other petitions before this Court were filed and traversed (R. 10, 18, 26, 43, 52, 148, 154, 157, 160).

The Court of Claims, after trial and special findings of fact, held: (a) The purpose of Friant Dam and the diversions of the San Joaquin waters was to irrigate non-riparian lands and not to aid navigation (R. 130-132); (b) the respondents had riparian rights which were confirmed by the California courts, left intact by the 1928 amendment to the state constitution, and taken by Friant Dam (R. 132-133, 138-141, 191); (c) Miller & Lux did not in its deeds reserve the right to sell these rights (R. 133-138); (d) the rights were taken as of October 20, 1941, when the first substantial impoundment of San Joaquin waters occurred (R. 141-145, 191); (e) the rights taken by the United States were worth $9 an acre (R. 145-146, 190-191). Motions for new trial were denied (R. 147, 193) and a timely petition for writs of certiorari granted.

SUMMARY OF ARGUMENT

I

The Government has never before argued in this Court that its powers over navigable waters include the power to destroy, without compensation, vested water rights

necessary for the irrigation of arid lands. We believe the contention could have been raised in more propitious circumstances. However this may be, the Congress has required that these water rights be bought, not seized, and the court does not reach the constitutional issues on which the Government obtained the writs of certiorari.

II

The Central Valley Project is being constructed under the reclamation laws, and is governed by Section 8 of the Reclamation Act of 1902. That section expressly protects water rights which are vested under state law. Its legislative history shows that this was a cardinal, and unchallenged, feature of the reclamation program which Congress was inaugurating. The decisions of this court have frequently recognized the force of Section 8, without regard to whether the stream is navigable or non-navigable.

The Central Valley Project, both in its administrative and in its legislative authorizations, called for the purchase and not the seizure of the San Joaquin water rights here in issue. The Department of Interior has already paid more than $5,000,000 for these water rights. It advised the Congress of its water rights purchase program in each of 12 years and requested and received funds for that purpose in each of 11 years. This was done as early as 1936 and as recently as 1948. As the Department of the Interior said, in 1945, with particular respect to the Central Valley, "The Bureau of Reclamation fully recognizes and respects existing water rights established under state law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure."

Whether or not, ther, the Constiution would require just compensation for the taking of these rights,

the Congress has declared that they should be paid for. The Court of Claims has jurisdiction to enter a judgment based upon this statutory promise, as claim arising either under a "law of Congress" or on a contract implied in fact.

III

As there is a clear statutory promise to pay just compensation for the riparian rights here in issue, the court does not reach the question whether there is also a constitutional promise. We discuss it, however, if only to explain the reasons for the statutory promise.

The navigation immunity in eastern waters does not mean that the Fifth Amendment is inapplicable, but merely that there is no property right, as against the Government's navigation powers, in the flow or the bed of a navigable stream. But the Congress has ever since 1866 recognized and protected the water rights which are necessary to existence on and the productivity of the arid lands of the west; this brief collects more than a score of such statutes. Among these is the Flood Control Act of 1944, which subordinates navigation work to the irrigation use of the waters. That Act covers nine projects in the San Joaquin basin, and acceptance of the Solicitor General's argument would have the paradoxical result of subordinating irrigation rights to a fictitious navigation purpose of an irrigation project while at the same time and in the same basin the Congress has subordinated purely navigation and commerce work to irrigation uses.

Wholly apart from this, the Government can prevail only if the water rights were taken for a navigation, or at least a commerce, purpose. They obviously were taken for no such purpose, but for sale to others for use in nonriparian lands. No part of the work on the San Joaquin will improve its navigability, or contribute in either a physical or a financial manner to the navigation improvement of the Sacramento River. The incidental flood con-

trol benefits of Friant Dam go almost entirely to crop lands, and the most generous possible estimate indicates that the estimated cost of $157,000,000 will produce only about $7500 a year of flood protection benefits to instrumentalities of interstate commerce. It therefore seems to us too plain for serious argument that respondent's rights were taken for irrigation and not navigation or commerce purposes. They were, therefore, compensable even under the cases involving eastern waters.

IV

The Solicitor General does not deny that the riparian right to the annual overflow of the San Joaquin waters was, prior to 1928, a vested and fully protected right under California law. He urges, instead, that a 1928 amendment to the California Constitution destroyed this right because it is a "wasteful" use of the water. But the California courts have settled this issue. The 1928 amendment eliminated the absolute protection which had been given riparian rights which were of no practical benefit to the riparian lands; it also eliminated the riparian power to enjoin the appropriation of water for a more beneficial use, but only if the appropriator replaced or paid compensation for the water which had actually benefited the riparian lands. The California Supreme Court has in 1933 recognized and protected the riparian rights to the San Joaquin overflow and the very rights here in issue were confirmed by a Superior Court decree in 1933. Even if the law were otherwise, the Court will note that the Government has not met the burden required by the California courts of showing that, as against respondents' use of the water, the appropriation will not be injurious. And here, just as with the Government's constitutional argument, it is plain that both the Congress and the agency charged with the administration of the project have determined that the rights in issue are compensable.

The one point in his extended and able argument where we consider the Solicitor General to be in agreement with either the Congress or the Department of the Interior is that of the construction of the Miller & Lux deeds to the respondents. This brief is directed only to the water rights clause in Nos. 299 and 301. The text of that clause—in its contrast between the "riparian" rights of respondents and the "water" rights of the grantor, and in its failure to include the "assigns" of the grantor—makes plain that Miller & Lux reserved no power to sell the riparian rights of the respondents, which rights were expressly declared not to be extinguished. The clause, when read against the background of California law, was simply intended to estop the respondents from exercising the ordinary powers of a riparian owner to object if the grantor chose to store its own water or to divert it to other lands. Most certainly, every presumption is to be exercised against a result so extraordinary as that which would give to Miller & Lux a floating power to sell for its own account the riparian rights which were a part and parcel of respondents' lands. Finally, as the court below held, the deed — whatever water rights it sought to cover — reserved only the right to store, and not to store and to divert to nonriparian lands.

V

The project was authorized in 1935 and the final injury to respondents' lands will not occur until 1950 or 1951. There are, in this 15 year period, a considerable number of dates which may be selected as the time of taking with the support both of respectable precedent and of reason. The court below and the Government itself, in its Miller & Lux contract, chose the date of first storage in October 1941. *Amici curiae* prefer the date of first storage for purposes of diversion, in February 1944. However this may be, *United States* v. *Dickinson*, 331

U. S. 745, seems to make plain that, when the Government chooses not to condemn, any reasonable date in the course of a continuous taking can be selected for purposes of computing interest. When the Government has contracted to buy, from the wrong person, the very rights here in issue as of July, 1939, and has made very substantial payments at that time, it cannot very gracefully complain that the court below has awarded the rightful owner interest since October 1941.

ARGUMENT

I

INTRODUCTION

This Court granted the petition for writs of certiorari to review interesting and wholly novel questions of constitutional law. We do not believe those issues can be reached in this case.

For about three quarters of a century not only the 17 western states but also the Congress have recognized that the irrigator's water right is fully as important and fully as deserving of protection as the uplands of the eastern landowner. For nearly half a century the reclamation laws, under which the respondents' water rights were taken, have placed the Government under a duty to compensate any irrigator whose water rights are taken. For more than a decade the Central Valley legislation has so decreed with respect to the very water rights here involved. The administrative practice of purchasing these water rights has been uniform and has repeatedly been disclosed to and ratified by the Congress.

The Government, before this litigation, has never urged to this Court that the powers of the United States over navigable waters include the power, for any purpose, to destroy vested water rights which are necessary to the irri-

gation of arid lands.[8] We do not believe that these cases present the most appealing circumstances in which to present such a contention.

1. The respondents' water rights are not being taken to improve navigation or to protect commerce. They are being taken for the purpose of sale by the United States for irrigation uses on nonriparian croplands.

2. The water rights are being taken when both Congress and the Department charged with the administration of the project thought they should and would be paid for.

3. The water rights are not being seized from all owners of grasslands along the San Joaquin. The Federal Government has already paid more than $5,000,000 to the landowners of the San Joaquin Valley for exactly similar water rights.[9] Because of doubts as to the application of California law to their particular case, a number of the small landowners, such as three of the respondents here, have been forced not only to bear the costs of suit but also to deal with novel assertions of federal power which, quite rightly, did not trouble the officials charged with the administration of the program.

4. The United States has already bought the very water rights in question in three of these cases, but unfortu-

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[8] In *United States* v. *Central Stockholders' Corporation*, 52 F. (2d) 322 (C. C. A. 9) the Government urged, on behalf of its Federal Power Act licensee, a right to take the overflow waters of the San Joaquin without compensation because of its navigation powers and as an upstream riparian owner. The court, holding the licensee liable to pay just compensatino under the Act, decided neither contention. It was obviously surprised at the Government's position (52 F. (2d) at 324, 329) and the failure of the Government to file a petition for writ of certiorari, as to issues so far-reaching as these, has more than usual significance. In *Southern California Edison Co.* v. *Herminghaus*, 275 U. S. 486, No. 188, Oct. Term 1927, a licensee of the Federal Power Commission urged that it possessed the alleged privilege of the United States to destroy riparian rights in the San Joaquin (Br. 91-97); its petition was dismissed after argument for want of a substantial federal question.

[9] In only one branch of the argument, that dealing with issues of state law, is the difference between the two types of grassland water rights—controlled and natural flow—of any significance.

nately, under the decision below, has contracted to pay the wrong person.

5. This is not only the first time the Government has urged to this Court that its sovereign powers over navigable waters reach to the western irrigator's water right, but the contention is presented, in three of the six cases before the Court, in circumstances where the beneficiary of that argument, should the Solicitor General prevail, is not the public treasury but Miller & Lux, Inc. Under the 1939 contract, if the Solicitor General should somehow persuade this Court that the United States has unnecessarily paid Miller & Lux $1,938,650, the result will be not the recovery of that sizeable amount but instead the payment of a further $511,350 to Miller & Lux.

In the following pages we present our statutory argument in detail. We shall then present in more summary form our thoughts on the constitutional issues so ably briefed by the Solicitor General. Thereafter we shall deal with the minor issues of California law and the date of the taking.

II

CONGRESS HAS DETERMINED THAT IRRIGATION WATER RIGHTS, VALID UNDER STATE LAW, MUST BE PAID FOR WHEN TAKEN BY A RECLAMATION PROJECT

In the succeeding part of this brief we show that there has been a consistent and undeviating recognition by the Congress, whenever the issue has been presented to it, that the western water right is a property interest to be as firmly protected as the eastern uplands (*infra*, pp. 38-42). It is, however, unnecessary to travel so broad a path and this section deals only with the reclamation laws under which the respondent's water rights were taken. These laws make unmistakably plain the intention of the Congress that all irrigation water rights, valid under state law, should be paid for when taken in aid of a reclama-

tion project. That being so, there is of course no constitutional issue, for the implied contract on which the jurisdiction of the Court of Claims rests may be founded on a statutory as well as a constitutional promise and duty.

A. The Reclamation Laws Generally

1. This Is a Reclamation Project. The Central Valley Project, after a few months existence as a Federal Emergency Relief Act project,[10] was formally authorized under the adminstrative procedure provided by the reclamation laws.[11] A finding of feasibility was made by the Secretary of the Interior on November 26, 1935, and his recommendation "of the Central Valley development as a Federal reclamation project" was approved by the President on December 2, 1935 (R. 91-93; Rsp. Br., App. i - x).

The project was twice again authorized as a reclamation project by specific act of Congress. In order to transfer $12,000,000 earlier appropriated to the Corps of Engineers, and to exclude this amount from the reimbursement provisions of the reclamation laws,[12] Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850) "reauthorized" the "entire Central Valley project"; it declared that, except as otherwise provided

[10] Under Section 4 of the Federal Emergency Relief Appropriation Act of 1935 (49 Stat. 115), the President had general authority "to prescribe the duties and functions of necessary agencies"; and under Section 1, reclamation projects were to be carried out by the Bureau of Reclamation and Department of the Interior. The President on September 10, 1935 made an allotment of $20,000,000 for the project; it prescribed that the funds should be used for the construction of Friant Dam and canals, and that they "shall be reimbursable in accordance with the reclamation laws." Montgomery and Clawson, *supra*, App. C., p. 247.

[11] Section 4 of the Act of June 25, 1910 (36 Stat. 835, 836, 43 U. S. C. Sec. 413) and Section 4-B of the Act of December 5, 1924 (43 Stat. 672, 702, 43 U. S. C. Sec. 371) authorize projects under the Reclamation Act of June 17, 1902, upon a written finding of feasibility by the Secretary of Interior approved by the President. The authorization under the reclamation laws followed the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174.

[12] See H. Rpt. No. 885, 75th Cong., 1st Sess., p. 40; S. Rept. No. 916, 75th Cong., 1st Sess., p. 46.

(i. e., the non-reimbursable $12,000,000), "the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation and maintenance of the dams, canals; * * * and incidental works deemed necessary to said entire project." This reauthorization under the reclamation laws was repeated in the Rivers and Harbors Act of October 17, 1940 (54 Stat. 1198, 1199-1200), which amended the proviso containing it to include also authority for "the construction under the provisions of the Federal reclamation laws of such distribution systems" as were necessary to deliver the stored water.[13]

2. Water Rights Taken by a Reclamation Project Must Be Paid For. The Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U. S. C. 391 et seq.) applies only to the 17 western states,[14] the lands of which are predominantly arid and the water law of which is predominantly appropriative. The Reclamation Act has been on the books for almost 47 years, and close to a billion and a half dollars has been spent in its execution. We know of no suggestion, until this litigation, that irrigation water rights recognized by state law might be taken by a reclamation project without compensation to the owner simply because the stream chanced to be navigable.

Section 8 of the Reclamation Act (43 U. S. C. sec. 383) provides:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in

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[13] See H. Rpt. No. 2361, 76th Cong., 3d Sess., p. 13; S. Rept. No. 1876, 76th Cong., 3d Sess., p. 4; S. Rept. No. 2072, 76th Cong., 3d Sess., p. 9.

[14] Section 1 of 1902 Act; Texas was added by the Act of June 12, 1906, 34 Stat. 259.

> conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof:

This language is unmistakably clear: nothing in the Reclamation Act is "to affect or to in any way interfere with" state water laws relating to irrigation, "or any vested right acquired thereunder:" and the projects were to be executed "in conformity with such laws." Nor can there be any thought that navigable waters are, by some vague distillation from the ordinary federal powers, to be put beyond this subordination. The language is all-embracing, and contains no saving of navigable waters such, for example, as that found in the Desert Land Act of 1877 (see *infra*, p. 39). It contains, indeed, explicit inference to the contrary, for the statute goes on to repeat that nothing in the Act "shall in any way affect any right" not only of the federal or state governments, but also of "any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."[13]

The legislative history of Section 8 contains just one statement which supports the Government. The House Committee reporting the bill said (H. Rpt. No. 1468, 57th Cong., 1st Sess., p. 6) that "Section 8 recognizes state control over waters of nonnavigable streams such as are used in irrigation." The Committee, as this sentence shows, was not considering the possibility of putting a navigable stream to irrigation uses and the statute itself is not confined to "nonnavigable streams." The Senate

[13] Not all interstate streams are navigable, but it is unlikely that Congress could legislate with respect to interstate streams without considering the problem of navigable streams. This clause was inserted to ensure that the Congress did not inadvertently influence the outcome of *Kansas v. Colorado*, 206 U. S. 46, a three-cornered dispute then pending between the United States as owner of the public lands, an appropriation state and a common law state, and carries no other affirmative significance. See *Wyoming v. Colorado*, 259 U. S. 419, 463.

Committee did not repeat the error of the House Committee. See S. Rept. No. 254, 57th Cong., 1st Sess. Nothing else in the legislative history suggests in any way a purpose to except navigable waters from the basic protection granted the water user by Section 8. There is, to the contrary, much evidence that Section 8 was intended to cover the use of all waters on the arid lands of the west.

The Reclamation Act was enacted in fulfillment of the pledge in the 1900 Republican Platform to enact "adequate national legislation to irrigate the lands of the United States, reserving control of the distribution of water to the respective States and Territories." 35 Cong. Rec. 6672, 6676. President Roosevelt in December 1901 strongly recommended enactment of such a measure, but was emphatic that the legislation should offer affirmative protection to state laws and "vested rights." 35 Cong. Rec. 6676, 6775-6776. The bill, drafted by a bipartisan committee of western Senators and Representatives, and cleared with the President (35 Cong. Rec. 6673), passed the Senate on voice vote (35 Cong. Rec. 2285) with very little relevant debate; Senator Clark of Wyoming, however, speaking specifically to the great navigable rivers of the west, commended the bill because "in the distribution of those waters it is right and proper that the various States and Territories should control." 35 Cong. Rec. 2222. Mr. Mondell of Wyoming was in charge of the bill in the House. He stated, with a supporting enumeration of past legislation, that "every act since that of April 26, 1866 has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation," and noted that Section 8 follows this "well established precedent in national legislation." 35 Cong. Rec. 6678, 6679. Mr. Mondell, in debate with Mr. Ray of New York, sustained the constitutional power of the United States to purchase or to condemn water rights necessary for its projects. 35 Cong. Rec. 6687-6688. It was recognized on both sides that the

section applied to navigable as well as to non-navigable streams. 35 Cong. Rec. 6696, 6738.

The protection granted the water user is made more emphatic by the fact that, even after the debates noted above, Section 8 was changed by Committee amendment on the floor of the House to include the specific prohibition against interference not only with state laws but also "any vested right acquired thereunder." 35 Cong. Rec. 6762.[16]

It seems to us to be perfectly evident, from the debates as a whole, that the draftsmen and the supporters of the Reclamation Act would have been shocked had anyone suggested that they were authorizing the United States, because of its powers over navigable waters, to destroy water rights necessary to the productivity of arid lands and the livelihood of western settlers. Mr. Sutherland of Utah, supporting the bill, pungently summarized the sentiment of Congress (35 Cong. Rec. 6770, 6769):

> This bill does not atempt to confer upon the Secretary of the Interior the power to deprive him [the water appropriator] of his vested rights. It would be absolutely void and worthless if it did.
>
> * * * *
>
> No lawyer would contend that under this bill the vested rights of an individual to water could be taken for the purpose of giving it to some other individual or individuals.

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[16] The changes made by the committee amendment in the prior text of Section 8 may be indicated as follows:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, [but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act] *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land-owner, appropriator or user of water in, to or from any interstate stream or the waters thereof:* * * *

This Court has often enough made plain that Section 8 of the Reclamation Act means just what it says.[17] It was cited in support of the fact that Congress "has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States." *Power Co.* v. *Cement Co.*, 295 U. S. 142, 164. The Secretary of the Interior, in acquiring water rights under the reclamation laws, must proceed "in the same manner as a private appropriator * * * under state law. His rights can rise no higher than those of Wyoming." *Nebraska* v. *Wyoming*, 295 U. S. 40, 43. Section 8 is "a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes." *Nebraska* v. *Wyoming*, 325 U. S. 589, 614. The United States, under Section 8, has the position "of an appropriator of water for storage under the laws of Wyoming," *Ibid.*, 629. See also, *Ickes* v. *Fox*, 300 U. S. 82; *United States* v. *Ramshorn Ditch Co.*, 254 Fed. 842, 845-846 (D. Neb.); *United States* v. *Humboldt Lovelock Irr. Light & P. Co.*, 97 F. 2d 38, 42 (C. C. A. 9), cert. den. 305 U. S. 630.

While none of these decisions chanced on their facts to be directed to the appropriation of navigable waters, that gap is closed by *Mason Co.* v. *Tax Commission*, 302 U. S. 186. The Court there, while noting the difficulties of navigation in the natural state of the upper Columbia (302 U. S. at 190-191), unmistakably held it to be navigable waters of the United States at the site of Grand Coulee Dam (302 U. S. at 198). The Court proceeded to note that Section 8 of the Reclamation Act preserved state control of water rights, stated that "the Act has been

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[17] Section 8 has been noted, in cases not arising under the reclamation laws, as further support for the proposition that the federal control of public lands does not reach to the control of the waters. *Gutierres* v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 554; *Kansas* v. *Colorado*, 206 U. S. 46, 92-93; *Wyoming* v. *Colorado*, 259 U. S. 419, 463. The two earlier cases noted an exception with respect to navigable streams, but this was in connection with issues wholly different from Section 8 of the Reclamation Act.

administered in harmony with this controlling principle that the State should not be ousted of jurisdiction" (302 U. S. at 199), and detailed at length the precise steps the United States had taken, under state law, in order to gain authority to appropriate, store and divert the project waters (302 U. S. at 199-203).

3. Respondents' Water Rights Were Vested Under State Law. The Solicitor General in at least one passage (Br. 68, see Br. 47) seeks to escape the force of Section 8 on the ground that it is inapplicable because there can be no valid water rights under state law in navigable streams. We believe his logic to be impeccable, but also that it proceeds backward from his conclusion to a thoroughly startling premise. His position in this respect goes far beyond that which gives the western states, *amici curiae* here, so much concern, and denies the validity even among private citizens of water rights to navigable rivers. If accepted, it would seem likely to reduce to chaos the economies which have been built on the Missouri, the Colorado, the Columbia, the San Joaquin, the Sacramento, the Rio Grande, and the other great rivers of the west.

The Solicitor General's error consists in assuming that two carefully limited propositions have universal application. (a) Putting aside the statutory waivers discussed below (pp. 38-42), the United States has, if it chooses to exert it, unquestioned power to prevent future appropriations of water which would destroy the navigability of a western stream. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.[18] But this power is one which overrides state law, and does not deprive the state of jurisdiction to establish as among its citizens rights in navigable waters, whether these rights are injurious or non-injurious to navigability. See *Arizona* v. *California*, 283 U. S. 423, 460-464; *Arizona* v. *California*, 298 U. S. 558, 569. See, also,

[18] See 21 Op. A. G. 518, 522, for a description of the purpose to acquire by this dam private control over the entire valley of the Rio Grande.

the *Rio Grande* case itself, at 709, as to the validity even as against the United States of non-injurious appropriations. (b) Because of a fear that otherwise the states could not, by adoption of an appropriation system, impair the supposed riparian rights of the public lands of the United States,[19] Congress passed the Act of July 26, 1866 and the Desert Land Act of 1877. These are noted below (p. 39); it is sufficient here that their purpose was to eliminate any inviolable riparian rights that might attach to the proprietary holdings of the Federal Government. See *Power Co.* v. *Cement Co.*, 295 U. S. 142, 154-158. Those acts; even if they should both be limited to nonnavigable waters, can in no way curtail the water rights before this Court: (i) The rights in question are those of private owners, and the United States asserts no claim here which is based upon any riparian ownership. (ii) The rights in question are riparian, not appropriative, and from any view no Congressional legislation was necessary to preserve those rights. (iii) The western states were admitted on equality with the eastern states, and whether or not their lands were once a part of the public domain, they have full power (subject only to the commerce powers of Congress) to fix the nature and extent of private rights to navigable streams and their beds. See, e.g., *Pollard* v. *Hagen*, 3 How. 212, 229-230; *Shively* v. *Bowlby*, 152 U. S. 1, 15, 26.

It has generally been assumed, as of course, that the western water right attached to navigable as well as nonnavigable streams. See e.g., Weil, Water Rights in the Western States (3d Ed., 1911), vol. I, sec. 339; Bannister, Federal Disposition of State Waters, 28 Harv. L. R. 270, 293.

4. **The Administrative Practice.** The Solicitor General relies upon one ambiguous paragraph in a 1905 decision

[19] It may be doubted that any lands acquired under the Treaty of Guadaloupe-Hidalgo carried riparian rights and is fairly clear that those from the province of Sonora did not. See *Boquillas Land & C. Co.* v. *Curtis*, 213 U. S. 339, 343.

of the Secretary of the Interior to establish what he implies to be a uniform practice under the reclamation laws to disregard water rights based on navigable waters. In *California Development Co.*, 33 L. D. 391, the Secretary refused to approve a plan for acquisition by the Bureau of Reclamation of the Company's canal and distribution works by which Colorado River water was brought, through Mexico, to the Imperial Valley. The ground of his decision was that there was no authority to acquire Mexican property or stock (33 L. D. at 405-408). In the course of his opinion he used the language quoted in the Government's brief (pp. 69-70). The decision did not involve the compensability of water rights taken for a reclamation project. It did not mention or cite Section 8 of the Reclamation Act. The Government's own quotation shows that the claimed water right was far in excess of the rights vested through use, and that it would in itself destroy the navigability of the river. It was, therefore, a simple application of the *Rio Grande* rule.[20] Most certainly it is not a contemporaneous interpretation of a statutory provision which was inapplicable and was not even mentioned.

The Government's statement that the question has not since arisen "in any administrative or judicial proceeding" is so far as we know accurate. But, it seems evident, this is because the Bureau of Reclamation has invariably recognized such rights and there has been no occasion for the issue to be raised in a contested proceeding.

It should, in any event, be noted that the Department of the Interior in collateral fields has frequently recognized the validity of water rights in navigable streams. In

[20] It is not without significance that, with reference to this very controversy, Congress directed the Secretary of Interior to investigate "as to what legislation, if any, is necessary to grant or confirm to present and future appropriators and users thereof perpetual rights to the use of said waters for irrigation." Joint Resolution of Apr. 28, 1904, 33 Stat. 591.

Theodore A. Iasigi, 39 L. D. 285, decided just five years after *California Development Co.*, it recognized for a desert land entry the validity of water rights which were in actual use, and therefore vested, and which were based upon the California Development Company diversion from the Colorado. See, also, 32 Op. A.G. 41. And in *Underground Water Claims, Utah*, 55 L. D. 378, 379 (1935), the Department noted that, apart from interference with the navigation powers of the Federal Government, state laws govern the appropriation and use of navigable as well as nonnavigable waters.[21]

We see no way of reconciling the implications of the statement as to administrative practice found in the Government's brief with the unqualified statement of the Department of the Interior in 1945, made with specific reference to the Central Valley Project and therefore embracing navigable waters, that "throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure" (*infra*, p. 33).[22]

We believe, in the circumstances, that the Court should read literally the Government's presentation of the administrative construction (Br. 70) and conclude that, except as above noted, there has been no administrative or judicial proceedings relating to the issue, and that the Government

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[21] The Department decisions recognizing state control of water rights and water users rights to them do not draw any distinction between navigable and nonnavigable waters. See *Jackson Hole Irrigation Co.*, 48 L. D. 278, 279; *Myers and Myers*, 49 L. D. 106, 109; *Authority to Cause Diversion of Waters*, 57 L. D. 400.

[22] See, also, the comment by Prof. Toelle, of the University of Montana law school, made with specific reference to the problems of the great navigable rivers of the west, that "for 43 years the Bureau of Reclamation has so scrupulously observed that policy [of Section 8] that it has come to be regarded as the champion of the arid west." Prospective Effect of Valley Authorities in Western Water Law, 20 Temp. L. Q. 425, 431.

makes no statement as to the actual administrative practice.

There seems, in truth, to be no instance in the long history of the reclamation laws in which the Bureau of Reclamation has ever undertaken to seize water rights, in navigable or nonnavigable streams, without paying full compensation for them. The Commissioner of Reclamation testified to the House Appropriation Commitee in 1936 that the United States under the reclamation laws filed under state laws exactly as does a private person and, further, that the Bureau has to condemn if it takes the water right of another.[23] To take a recent illustration the Department of the Interior assumes as of course that its development of the water resources of the Colorado River basin must await state decision as to the use of the water; it speaks of the existing "vested rights" in irrigation water; and it recognizes, ordinarily tacitly and as of course, its duty of providing compensating storage for appropriated water rights, or else an exchange of water rights. The Colorado River (U. S. Dept. of Interior, Washington, 1946) pp. 3, 13, 109, 164-166, 180, 185. It is unnecessary to pursue the administrative construction throughout the history of its many projects, for the legislative and administrative construction is clear beyond any dispute with respect to the Central Valley Project itself, which is the only major example of a Reclamation project which involves an outright taking, as opposed to a replacement, of a substantial volume of water rights vested under state law.

B. The Central Valley Project

The full development of the Central Valley, it has always been recognized, requires that the grassland water rights along the San Joaquin be sacrificed in order to per-

[23] Hearings before House Appropriation Committee, Interior Dept., Fiscal Year 1937, 74th Cong., 2d Sess., p. 180.

mit a higher development of irrigable crop lands along the Madera and Friant-Kern canals. It has never occurred to anyone, until this litigation, that the rights to this water might be seized, for the purpose of resale, without compensation. To the contrary, every authorization of the project and every action in execution of the project has ensured that payment be made.[24]

1. **The Authorizations.** The administrative authorization, under the reclamation laws, of the Central Valley Project in 1935 is unmistakably plain. It estimates that $8,000,000 of the total costs will be required for "rights of way, water rights, and general expense," and particularizes this estimate by the explanation (R. 93)

> Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land * * *.

When the project was reauthorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), the Congress expressly provided:

> * * * the Secretary of the Interior * * * may acquire by proceedings in eminent domain or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes * * *.

It is hard to see how this language may be tortured into a conclusion that water rights were to be treated any differently than lands, rights-of-way, and other property, or how it can be argued that the power to "acquire by proceedings in eminent domain or otherwise" could include the power to seize and then to deny liability for the taking.[25]

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[24] When the State of California proposed itself to develop the project, Section 11 of the Act of 1923 (Cal. Stats. 1933, pp. 2643, 2651) provided that "in no other way than by purchase or otherwise as in this act provided shall water rights * * * be impaired or curtailed."

[25] It will be noted that the Central Valley Project, as authorized in 1935 and in its present form, involves only two rivers, the Sacramento and the San Joaquin, and involves the taking of water rights only from the San Joaquin. See the feasibility reports of 1935 (R. 91-93; Resp. Br., App., i - x) and 1947 (H. Doc. No. 146, 80th Cong., 1st Sess.). There is, therefore, no room for any argument that the authorizations contemplated the purchase of riparian rights to nonnavigable waters but not to those of the San Joaquin.

2. The Practice. The Bureau of Reclamation has acted consistently on the assumption that it was required to pay for the vested water rights which would be taken by the project. This practice has, moreover, for more than a decade regularly been disclosed to the Congress and regularly approved by the Congress.

The contentions of the Solicitor General lead also to the conclusion that the Government need not purchase or replace the San Joaquin water used on croplands. The Bureau of Reclamation, to the contrary, has undertaken a gigantic engineering scheme — the movement of the excess waters of the Sacremento 150 miles up the San Joaquin — for no other purpose than the replacement of the San Joaquin water used on croplands. In this way 1,000,000 acre-feet of water will be supplied each year to 285,000 acres of land (R. 93, 94). The total cost of this construction work, apart from power facilities, and excluding operation and maintenance, will be about $83,000,000.[26] This heavy expenditure, well in excess of $100,000,000, is wholly unnecessary if the Solicitor General's argument be sound. We pass, however, to the grassland water rights immediately in issue here, and show that the Government's obligation to pay for their taking has been recognized with equal clarity.

F. Y. 1937. The first appropriation request included $8,000,000 for "water rights and general expense." Supplemental Hearing, Subcommittee of House Committee on Appropriations, Interior Department,[27] p. 79. A considerable part of these funds seem to have been allowed. See Act of June 22, 1936, 49 Stat. 1597, 1622, and estimate for fiscal year 1938, discussed below.

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[26] Central Valley Federal Reclamation Project, *supra* n. 1, p. 12 (the total includes only the Delta Cross Channel and the Delta-Mendota Canal).

[27] All references in this subsection are to the Central Valley Project and the hearings, except as otherwise noted, are those before the above subcommittee; the date and the session of the Congress appear sufficiently from the fiscal year.

F. Y. 1938. The Bureau requested $15,000,000 for three purposes, one of which was "the purchase of the greater part of the water rights that must be acquired." Hearings, p. 281. Its breakdown showed that a total of $6,500,000 was estimated for the purchase of "water rights, rights of way, etc.", that $3,500,000 was available and that $1,500,000 was asked for 1938. Hearings, p. 282. The House Committee in its report referred to this breakdown. H. Rpt. No. 786, 75th Cong., 1st Sess., p. 15. The Congress appropriated $12,500,000 for the project generally. Act of August 9, 1937, 50 Stat. 597.

F. Y. 1939. The Bureau had available $4,300,000 of the $6,500,000 estimate for "water rights, rights of way, etc.", and requested $500,000 for the fiscal year 1939. Hearings, p. 349. The House Commitee referred to this breakdown. H. Rpt. No. 1855, 75th Cong., 3d Sess., p. 14. The Congress appropriated $9,000,000 for the project generally. Act of May 9, 1938, 52 Stat. 291, 324.

F. Y. 1940. The Bureau informed the Congress that "the Miller and Lux water rights contract has been brought to a point where a conclusion of negotiations seems imminent." Hearings, p. 421. An additional $265,000 was requested for water rights. Hearings, p. 422. The Committee referred to this breakdown. H. Rpt. No. 161, 76th Cong., 1st Sess., p. 16. The Congress appropriated $10,000,000 for the project generally. Act of May 10, 1939, 53 Stat. 685, 719.

F. Y. 1941. The Bureau informed the Committee that $4,190,000 had been spent for "water rights, rights of way, etc." out of the estimated total of $6,520,000. It requested no funds for 1941. Hearings, p. 495. The Commitee referred to the "statement of construction progress" which included the water rights item. H. Rpt. No. 1709, 76th Cong., 2nd Sess., p. 14.

F. Y. 1942. The Bureau advised the Congress that $5,616,000 was now estimated for the total program of "wa-

ter rights, investigations, etc." of which $4,258,000 would be spent by the end of F. Y. 1941; another $832,000 was requested for 1942. Hearings, p. 741. The Congress appropriated $34,750,000 for the project generally. Act of June 28, 1941, 55 Stat. 303, 336.

F. Y. 1943. The Bureau advised the Congress that its total program for "water rights, investigations, etc." was $5,606,000, and requested $183,000 for 1943. Hearings, pp. 434-439. The Congress appropriated $39,019,000 for the project generally. Act of July 2, 1942, 56 Stat. 506, 537.

F. Y. 1944. The Bureau requested $500,000 for "examination, surveys, water-rights, etc. not allocated to divisions." Hearings, p. 1174. The Congress appropriated $200,000 for "examinations, surveys and water rights." Act of July 12, 1943, 57 Stat. 451, 477.

F. Y. 1945. No reference was made to water rights.

F. Y. 1946. The Bureau advised the Congress, with reference to Madera Canal, that "water rights necessary to provide an adequate supply of water for the irrigation of project lands will be required." It stated that $293,400 would be spent in 1946 for "examination, surveys, water rights, etc.," but requested no additional appropriation. Hearings, p. 1200.

F. Y. 1947. The Bureau advised the Congress that its total program for water rights in the Friant Division was $867,100 for investigation and $4,500,000 for "purchase and acquirement." Of this $728,280 would be spent for investigation and $4,091,570 for "purchase and acquirement" by the end of F. Y. 1946. It requested $80,000 and $230,000 for the respective purposes in 1947. Hearings, Pt. 2, pp. 315-317. Congress appropriated $6,284,020 for irrigation facilities generally. Act of July 1, 1946, 60 Stat. 348, 367.

F. Y. 1948. The Bureau advised the Congress that its total program for the acquisition of San Joaquin water

rights was $5,367,000 and asked $257,300 for 1948. Hearings, Pt. 3, pp. 749-752. The Congress appropriated $5,622,028 for irrigation facilities generally. Act of July 25, 1947, 61 Stat. 475.

F. Y. 1949. The Bureau advised the Congress that a total of $5,750,000 would be required for the purchase of water rights for the Friant division and requested $332,000 for 1949. Hearings, p. 1214; Senate Hearings, p. 923. The Congress appropriated $30,876,900 for "irrigation facilities generally." Pub. No. 841, 80th Cong., 2d Sess. There was, moreover, in this year a rather full explanation of the water rights purchase program along the San Joaquin given (about a month after the argument of these cases in the court below) by the Regional Director of the Central Valley Project.[28]

1936 - 1949. This Court has rarely if ever been offered so extensive and complete an example of contemporaneous and consistent administrative practice, made known to and ratified by the Congress. Over the past 13 years, the Bureau of Reclamation has in each of 12 years advised the Appropriation Committee that it was purchasing San Joaquin water rights; it has in each of 11 years requested and received appropriations for this purpose; and for fiscal year 1944 the accidents of appropriation structure included a specific statutory itemization for the water rights as such.

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[28] His testimony (Hearings, pp. 1280-1281) was:

MR. JENSEN. * * * The next item is "Water rights, $332,000." Tell us about it.

MR. BOKE. * * * on the San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area of their water. * * * Part of that $332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area and we have settled with about 212 of them.

We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of the money will be used in settling those cases.

In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley.

Moreover, the feasibility and allocation report of the Secretary of the Interior, submitted to the Congress under approval of the President dated February 19, 1947, makes plain this common understanding that the San Joaquin water rights must be purchased. This report, which is a basic document under Reclamation practice, estimates the total cost of "water rights and miscellaneous" at $8,457,500. Central Valley Reclamation Project, H. Doc. No. 146, 80th Cong., 1st Sess., p. 12. It explains that "more than three-fifths of this total represents the cost of acquiring certain water rights (particularly along the San Joaquin River), easements and settlements necessary for the construction and operation of the project." *Ibid.*, p. 14. It notes that of the total estimated cost, $5,367,100 is "for water rights purchased." *Ibid.*, pp. 25, 41.

The comprehensive plan for the ultimate development of the Central Valley Basin, distributed by the Department of Interior for comment in November 1945, makes this even plainer. It estimates that $1,100,000 will be necessary after June 30, 1945 to complete the purchase of rights on the San Joaquin. More explicitly, the description of the plan contains this categorical reassurance to the water user:[29]

> In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure.

It is unnecessary to proliferate citations to the cases in which this Court has accepted administrative construction of doubtful statutes. It is sufficient, if the controlling stat-

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[29] Comprehensive Plan for Water Resources Development, Central Valley Basin, California (U. S. Dept. of Int., Bur. of Reclam. Proj. Planning Rpt. No. 2-4.0-3, Nov. 1945), pp. 24, 21.

utes were in any way doubtful, that this administrative and legislative record, more than in any case in recent years, "not only confirms the departmental construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act." *Brooks* v. *Dewar*, 313 U. S. 354, 361. See, as to the reclamation laws, *Swigart* v. *Baker*, 229 U. S. 187, 197-199.

C. The Statutory Promise Is Ground for Suit

The Government's argument (Br. 60-65) on this score seems to veer between a substantive argument that Congress promised no compensation and a jurisdictional argument that the promise if made would not give the Court of Claims jurisdiction of these suits.

The contention that the Central Valley authorizations and appropriations were a mere authorization to the Secretary in his discretion to make payment for the seized water rights does not advance the Government's case: (a) the repeated appropriations by Congress, made on the assurance that the seized water rights would be paid for, are certainly sufficient as a Congressional direction, if more than an authorization should be necessary; (b) Section 8 of the Reclamation Act is a quite plain "direction"; and (c) if the Congress should merely have been leaving the matter to the Secretary's discretion, that discretion has been exercised in favor of payment — as to three cases before the Court he undertook to buy from the wrong person and as to the other three an agreement on price could not be reached (see Govt. Br. 61-62, n. 12).

The Congress has, even if the duty to pay for the taking here could be so charitably described, full power to create obligations based upon moral or honorary grounds. *Pope* v. *United States*, 323 U. S. 1, 9-10, and cases cited. Even though no express provision is made for suit, the statutory obligation so created carried with it Court of Claims juris-

diction of a suit based upon that "law of Congress." *United States v. Realty Co.*, 163 U. S. 427; *Medbury* v. *United States*, 173 U. S. 492, 497-498; *McLean* v. *United States*, 226 U. S. 374, 378; *United States* v. *Hvoslef*, 237 U. S. 1, 10-11; *United States* v. *Laughlin*, 249 U. S. 440, 442-443. So, too, the statutory provision for purchase and compensation will serve to create a promise implied in fact to pay for the property taken just as fully as the command of the Fifth Amendment with respect to other types of property interests. See *United States* v. *Alexander*, 148 U. S. 186, 188-192, and the reliance placed upon the statutory recognition of the taking in *United States* v. *Lynah*, 188 U. S. 445, 467. The reasoning of the *Lynah* case is as applicable to a statutory as to a constitutional obligation to pay. See, also, *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330, 333; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21. It may also be noted that Judge Cardozo, in *Oswego & Syracuse R. R. Co.* v. *State*, 226 N. Y. 351, 124 N. E. 8 (cited with approval in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377) sustained the New York Court of Claims jurisdiction in a statutory setting analogous to that found here.

The Solicitor General places much reliance on *Mitchell* v. *United States*, 267 U. S. 341 (Br. 62-63). But that case, as his own quotation shows, recognized that suit in the Court of Claims would be allowed if the plaintiff could show a statutory right of payment; the Court held only that the general provision authorizing payment for "damages and losses * * * resulting from the procurement of the land" did not show a sufficient intention to widen the ordinary and long-accepted limits of recovery for an eminent domain taking. *Great Western Serum Co.* v. *United States*, 254 U. S. 240, appears to be the same sort of case. Neither has any application to a statutory policy in force since 1902, specifically applied to this project, and repeatedly ratified by the Congress in its annual appropriations.

III

VALID IRRIGATION RIGHTS ON THE SAN JOAQUIN COULD NOT BE SEIZED WITHOUT COMPENSATION EVEN BY WORK OUTSIDE THE RECLAMATION LAWS

We see no way by which, in the face of the legislation discussed above, this Court can reach the interesting and novel constitutional issues discussed by the Government. They have, however, a relevance to this case at least by way of explanation of the action of Congress in prescribing that the San Joaquin irrigation waters should be paid for when taken by the Government. We shall, therefore, sketch the constitutional issues as we see them.

A. The Navigation Immunity Does Not Reach to the Seizure of Irrigation Water

1. The Navigation Immunity. This Court has never considered the consequences of navigation or commerce work which takes water rights in a case arising from any of the 17 western states.[30] If it should ever be forced to face the problem presented by a denial of liability for a taking of vested irrigation rights, we believe that it will probably reach a different result than that of the eastern cases.

The United States has, of course, a plenary power to control and improve navigation, and to protect interstate commerce, in western as in eastern streams.[31] But a plenary power of control does not of itself give the privilege of seizing private property without compensa-

[30] The Court in *United States* v. *Willow River Co.*, 324 U. S. 499, 504-505, noted the contrasting systems of water rights as between the eastern and western states but did not spell out the consequences of the differences; no other just compensation decision has even noted the difference between the water rights systems.

[31] *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690, 703-709; *United States* v. *Utah*, 283 U. S. 64, 90; *Arizona* v. *California*, 283 U. S. 423, 452; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523, 534-535.

tion. *United States* v. *Causby*, 328 U. S. 256. Indeed, the ordinary requirement of just compensation applies to navigation work itself.[32] The costless "taking" often prescribed by the navigation cases is not an inexplicable exception to the Fifth Amendment, but is instead a reflection of the conclusion that the "owner" had no property right which was taken.

This is made plain enough by the cases denying compensation. "That the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69. "There is no private property in the flow of the stream." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. The owner, "as against the demands of commerce, has no private rights of access to the waters." *United States* v. *Commodore Park*, 324 U. S. 386, 390-391. The lands below high water mark are held "subject to the servitude in respect of navigation," *Gibson* v. *United States*, 166 U. S. 269, 272; *Willink* v. *United States*, 240 U. S. 572, 580; the owner has "a bare technical title * * * held at all times subordinate" to the needs of navigation, *Scranton* v. *Wheeler*, 179 U. S. 141, 163. One cannot have as against navigation needs a compensable "private property right" to submerged lands, *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88; "as against the Government such private interest is not a right at all." *United States* v. *Willow River Co.*, 324 U. S. 499, 510.

If, then, there can be no property right as against the Federal Government in the waters of western navi-

[32] The United States must pay just compensation for the permanent flooding of uplands, *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Dickinson*, 331 U. S. 745; *Hood* v. *United States*, 46 Ct. Cls. 30; for the property interests taken by intermittent flooding or erosion, *Jacobs* v. *United States*, 290 U. S. 13, 16; *United States* v. *Dickinson*, supra; for flooding out the right of access to public highways, *United States* v. *Welch*, *supra*; *United States* v. *Grizzard*, *supra*; and, possibly still, for eliminating the drainage from uplands, *United States* v. *Lynah*, 188 U. S. 445.

gable streams, these cases apply with full force. If, on the other hand, there is such a property right, then they are inapplicable and irrigation rights may not be seized without the payment of just compensation.

2. The Western Water Right. As a general rule, the property interests for which the United States must pay just compensation are those recognized by state law. *United States* v. *Powelson*, 319 U. S. 266, 279; *United States* v. *Causby*, 328 U. S. 256, 266; Federal Eminent Domain, secs. 15B, 15F. This rule has on occasion been applied to riparian or other rights with respect to navigable waters. See, e. g., *United States* v. *River Rouge Co.*, 269 U. S. 411, 418; *cf. United States* v. *Central Stockholders' Corp.*, 52 F. 2d 322 (C. C. A. 9). It is shown below (pp. 49-56) that the riparian rights here in issue are vested rights of property under state law. It is true, however, that the customary servitude of navigable waters to the commerce powers of Congress is taken to be one fixed by the Constitution. In that view one must go farther than state law, and show that the property interest has been recognized and confirmed by Congress. For, just as Congress may waive a constitutional immunity from state taxation,[33] so it assuredly has power to recognize as property rights riparian interests which otherwise might be taken by the United States without compensation.[34] See *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377.

It is entirely clear that, in addition to the reclamation laws already discussed, Congress has repeatedly and emphatically recognized and protected the water rights of

[33] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525-526; *Helvering* v. *Gerhardt*, 304 U. S. 405, 417; *United States* v. *Bekins*, 304 U. S. 27, 52.

[34] Compare *United States* v. *Causby*, 328 U. S. 256, 263-264, where the Court accepted the 500 foot level, prescribed by the Civil Aeronautics Authority under statutory authority, as the measure of the air space which the landowner was entitled to have free of aircraft.

the arid lands. The Act of July 26, 1866 (14 Stat. 251, R. S. Sec. 2339, 43 U. S. C. sec. 661) is the basic enactment. It covers the entire field open to Congressional action,[35] and declares broadly:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same;"

From 1866 to the present day the Congress has repeatedly and consistently acted upon this principle. The Desert Land Act of 1877 (19 Stat. 377) held open to public appropriation all unappropriated waters "upon the public domain and not navigable." See *Power Co.* v. *Cement Co.*, 295 U. S. 142, 157. The Act of March 3, 1891 (26 Stat. 1095) granted ditch rights-of-way, but was careful to provide that nothing should "interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Similar precautionary provisions, in addition to the fundamental recognition given state laws by section 8 of the Reclamation Act, are frequent in the federal reclamation and related laws.[36] Indeed, the Congress, in authorizing irri-

[35] The statute has not, it is true, been construed in all respects as broadly as its terms would permit. Thus, in *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690, the Court held it overridden by the Act of September 19, 1890 (26 Stat. 454) forbidding obstructions to the navigable capacity of waters (174 U. S. 707-710), intimated strongly that it did not in any event authorize diversions which interfered with navigability (174 U. S. 706-707), and suggested that it was directed only at nonnavigable waters (174 U. S. 706). See, also, *Power Co.* v. *Cement Co.*, 295 U. S. 142, 155. So, too, it has ordinarily been read as directed to water rights on the lands constituting the public domain in 1866. See, e. g., *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670; *Broder* v. *Natoma Water Co.*, 101 U. S. 274.

[36] Section 2 of the Warren Act of February 21, 1911 (36 Stat. 925, 43 U. S. C. sec. 524); Section 11 of the Raker Act of Dec. 19, 1913 (38 Stat. 242, 250); Section 18 of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. sec. 617a); Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940 (54 Stat. 774); Sec. 3 (b) of the Water Conservation and Utilization Act of October 14, 1940 (54 Stat. 1119).

gation or water control projects which might in any way conflict with state water law, customarily makes either the efficacy of the legislation or the initiation of the project depend upon the consent of the state or states concerned.[37]

Even on a major interstate stream, constituting navigable waters of the United States, the Congress was careful to preserve state authority over water rights.[38] So, too, Congress has approved interstate compacts which in terms preserve state control of the appropriation, use and distribution of waters taken from navigable rivers.[39] The most recent compacts relating to interstate waters carry this precautionary assurance to the water users one step further, and categorically guarantee him protection against any loss of his rights by federal action.[40]

The same solicitude by Congress is reflected in Sec. 27 of the Federal Water Power Act of 1920 (41 Stat. 1063, 16 U. S. C. sec. 821), a statute largely confined to navi-

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[37] See Sec. 7 of the Red Bluff Project Act of June 18, 1926 (44 Stat. 753); Sec. 4 (a) of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. sec. 617c); Sec. 1 (c) of the Columbia Basin Anti-Speculation Act of May 27, 1937 (50 Stat. 208); Sec. 7 of the Columbia Basin Project Act of March 10, 1943 (57 Stat. 14). Thus, in modifying water user obligations in the Uncompahgre Project, Congress made its legislation conditioned upon state legislation and a state court decree permitting *inter alia*, the necessary adjustment of water rights. Act of January 31, 1931 (46 Stat. 1974).

[38] See Sec. 8 (b), 12 (b), 12 (c) of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. Sec. 617 g, 1).

[39] See Art. IV of Colorado River Compact, approved by Sec. 13 of the Boulder Canyon Project Act of December 21, 1928 (50 Stat. 1057, 43 U. S. C. sec. 6171); Art. VIII of the Rio Grande Compact, approved by the Act of June 17, 1930 (46 Stat. 767); Art. XII of the Rio Grande Compact, approved by the Act of May 31, 1939 (53 Stat. 785).

[40] The Congress in approving both the Republican River and the Belle Fourche River Compacts has enacted, as requested in the compacts that:

> "The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters * * *.

Sec. 2 (a) (3) of the Act of May 26, 1943 (57 Stat. 86) and of the Act of February 26, 1944 (58 Stat. 94).

gable waters of the United States, that nothing therein "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation or distribution of water used in irrigation or for municipal or other purposes, or any vested right acquired therein." See *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 378-379.

The federal policy is, finally and most clearly, indicated in the Flood Control Act of December 22, 1944 (58 Stat. 887), Section 1(b) of which provides:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

This policy has become a standard provision in all subsequent rivers and harbors and flood control acts.[41] The 1944 Act covered some nine projects in the San Joaquin basin. (58 Stat. at 901-902). It would be extraordinary, indeed, if a decision of this Court should read the reclamation laws to subordinate vested water rights to a highly fictitious navigation interest while the real navigation and flood control work in the same valley is subordinated to irrigation rights.

This array of statutes is relevant both in their literal application and as indicative of the Congressional policy. In their literal application, they indisputably protect the western irrigator in many instances where there might

[41] Rivers and Harbors Act of 1945, 59 Stat. 10, 11; Rivers and Harbors Act of 1946, 60 Stat. 634; Flood Control Act of 1946, 60 Stat. 641; Rivers and Harbors Act of 1948, Sec. 101, Pub. No. 858, 80th Cong., 2d Sess.; Flood Control Act of 1948, Sec. 202, Pub. No. 858, 80th Cong., 2d Sess.

well be no protection in the eastern states: examples are all navigation and flood control work authorized in 1944 or later, or on the streams covered by compacts, and activities under the Federal Water Power Act. Until the present litigation, it had generally been supposed that the protection against reclamation work given by Section 8 was similarly indisputable. The Act of July 26, 1866, would seem on its face to cover all waters, navigable or not, flowing over the public domain.[42] If so, we know of no type of federal work on navigable rivers which is not forced by Act of Congress to recognize vested rights to irrigation water.

There would be gaps in this protection if, for example, the Act of 1866 were actually held inapplicable to navigable waters, and if the Solicitor General's construction of the Reclamation Act were accepted. But it is very hard to escape the conclusion that Congress, although acting in a piecemeal fashion, has on every occasion when the issue was presented taken pains to protect the rights of the irrigator. This does not mean that one may destroy navigation in order to obtain water rights for new irrigation. *United States* v. *Rio Grande Irrigation Co.*, 173 U. S. 690. But it does mean that the Congress has, whenever the issue arose, taken steps to ensure that present irrigation uses should not be destroyed, without compensation, in the name of navigation or flood control. Since it has, accordingly, elevated the western water right into a property right even as against the Government when jeopardized by any of a dozen or so types of projects, it seems that this Court should pause before holding, even if this were a type of project which had not specifically been covered, that the irrigator had no more of a property right than the eastern power company.

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[42] As indicated in note 35 above, the Court in the *Rio Grande* and *Cement Co.* cases assumed or suggested that the "nonnavigable" qualification of the Desert Land Act was to be read into the Act of 1866. This has never been squarely decided, and it is hard to believe that Congress in 1866, as today, did not wish to protect the very extensive development based on the waters of the navigable rivers.

B. Irrigation Work Cannot Benefit from Any Navigation Immunity

We shall sketch here the outlines of an alternative position, that whatever the Congressional recognition of respondents' rights to the San Joaquin water, they cannot be seized without compensation because the taking was for the purpose of resale as irrigation water, rather than for the improvement of navigation or the protection of commerce.

1. **Navigation.** There is no doubt that the improvement of navigation is one of the cardinal objectives of the Central Valley Project as a whole, and that this has authoritatively been declared by the Congress. Act of August 26, 1937 (50 Stat. 844, 850) as amended by Act of October 17, 1940 (54 Stat. 1198, 1200).

There is, on the other hand, no doubt that Friant Dam itself will in no way aid navigation. It will, indeed, substantially dry up the San Joaquin above Mendota and will diminish its navigability at all points above Stockton (R. 103).[43] The navigation benefits flow entirely from Shasta Dam and are confined solely to the Sacramento River.[44] The water of the Sacramento is an engineering condition precedent to the irrigation work on the San Joaquin and the Shasta power revenues are necessary to support the San Joaquin project, but the San Joaquin work

[43] It should be noted that under the earlier plan the Sacramento water would be pumped up the San Joaquin, rather than through the Delta-Mendota Canal, and that locks were contemplated to give a 6-foot depth to Mendota. See President's Report on Central Valley Project of June 4, 1934, H. Doc. 395, 73d Cong., 2d Sess.; letter of Secretary of the In- That plan has been abandoned (R. 94). The State of California had reference to this plan when it enacted in 1933 that Friant Dam was to be in aid of navigation. Stats. of 1933, p. 2643. This provision was carried forward in 1943 merely as a part of a general reenactment of the water code. Cal. Stats. 1943, pp. 1604, 1747.

[44] See, for the most detailed discussion, Central Valley Project Studies, Allocation of Costs (U. S. Dept. of Interior, Bureau of Reclamation, 1947), pp. 78-83, 121-124.

is neither necessary nor useful to the navigation improvement of the Sacramento.[45] The Solicitor General, then gains no benefit from the rule that the United States has authority to destroy navigation in one part of a river in order to improve navigation in another.

The combination of Friant into a comprehensive plan is not enough to put it in the status of a navigation project. The nonnavigation diversion of the San Joaquin is tied by the overall plan into another project with navigation ends, but only in the sense that separate projects are coordinated and jointly planned to obtain the maximum benefit from each. And respondents seek redress not against the entire Central Valley project, not against any comprehensive plan, but only against a specific diversion of the San Joaquin. See *South Carolina* v. *Georgia*, 93 U. S. 4.

It is true, if the issue be the power of Congress to undertake the work or to exercise its regulatory powers, the courts will examine the comprehensive plan of which the particular project is a part. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527-528; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426-427. We do not doubt that, if a navigation purpose were necessary to authorize the project, the San Joaquin Valley work would be a justifiable corollary to gain the greatest general benefit from the work on the Sacramento. But the issue is one of compensability, not of authority. For this one must look to the work which accomplished the taking, not to the grand scheme of the water basin planners. The Bureau of Reclamation, for example, is authorized to construct transmission lines away from Shasta because, *inter alia*, it is an incident of the federal power to improve navigation; but this does not mean that it need not pay for the land taken to erect the lines.

[45] Feasibility Report, Central Valley Project, H. Doc. No. 146, 80th Cong., 1st Sess., pp. 21-22.

The Department of the Interior is now planning its reclamation and related work in terms of the great river basins of the West.[46] Each plan includes scores of projects covering tens of thousands of square miles. Sometimes the work is grouped together under the head of a single "Central Valley Project," "Columbia Basin Project," or "Missouri Basin Project." See, e. g., Appropriation Act of July 25, 1947, 61 Stat. 460, 475-476. The Government's contention would spread the navigation immunity over every project on every tributary creek simply because the basin plans were integrated in a consistent whole.

United States v. *Commodore Park*, 324 U. S. 386, will support no such result. It is one thing to view a single dredging operation involving both a bay and a nearby creek as a single project and quite another to say that pleasure boat navigation on the lake formed by Parker Dam on the lower Colorado can, through the magic of integrated planning, make into a navigation project the Kendall irrigation project in Wyoming, 1200 miles north and two miles up. *Commodore Park*, it may further be noted, is inapplicable here in quality as well as in degree, for the damage on Mason Creek was in aid of the dredging in Willoughby Bay, while the San Joaquin Valley work in neither an engineering nor a financial sense is of any aid whatever to the navigation work on the Sacramento (*supra*, pp. 43-44).

This conclusion involves no effort to look behind the Congressional declaration of a navigation purpose *into* the true motives of Congress.[47] It involves instead the more modest request that the Congressional declaration be read as Congress itself understood the facts: one project

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[46] See, e.g., The Colorado River (U. S. Dept. of Interior, 1946); The Columbia River Basin (U. S. Dept. of Interior, 1946).

[47] *Cf. Arizona* v. *California*, 283 U. S. 423, 455-456; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 528; *United States* v. *Commodore Park*, 324 U. S. 386, 392.

in the comprehensive plan, Shasta Dam, was intended to aid navigation, while another, Friant Dam, was intended to produce only irrigation benefits.

2. Flood Control. Friant Dam, as an incident to its irrigation purpose, will produce substantial flood control benefits. But, as the issue here is the compensability of a taking, those flood control benefits are relevant only so far as they relate to interstate commerce. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423-424, 426-427; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525, 527-528. Any flood control benefits of Friant Dam to commerce are both incidental and wholly trivial.

The San Joaquin Valley has suffered an average annual flood damage estimated at $1,460,000.[48] But this is almost entirely damage to crop lands; only 7.6% or about $110,000 represents damage done to "roads, bridges, buildings, equipment and utilities."[49] Given the wide coverage of this category and the abnormalities of the period covered, it is generous to assume a $50,000 annual damage to roads and bridges. Friant Dam will decrease this damage only by about $7,500 a year.[50] The estimated cost of the San Joaquin Valley irrigation work is $157,000,000.[51] This is unparalleled and incredible extravagance if a motivating purpose of the project is to give flood protection to instrumentalities of interstate commerce. That protection, almost too obviously for argument, is both trivial and

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[48] Report of Chief of Engineers on San Joaquin River, H. Comm. on Flood Control, Comm. Doc. No. 2, 78th Cong., 2d Sess., pp. 29, 32.

[49] *Ibid.*, p. 31. This census, the only one made, relates to 1937-1938. It largely overrates the flood damage to roads and bridges. These are damaged only by rain floods (p. 30) and in 1937-1938 there were 3 rain and 1 snow-melt floods (p. 29) whereas in the whole period 1900-1940 there were only 15 rain and 23 snow-melt floods (p. 29).

[50] Friant will reduce the total annual damage of $1,460,000 by only $240,000. *Ibid.*, p. 43. (Two tributary dams, in contrast, will reduce it by $1,198,000. *Ibid.*, p. 43.)

[51] Feasibility Report, *op. cit.*, p. 12.

wholly incidental to the irrigation purpose of Friant Dam.

It may be that this commerce-flood-protection would be sufficient to justify the project. But if considered without regard to the other sources of federal reclamation power, such as public lands and general welfare, the case would be a closer one than any yet decided. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 528-534. However this may be, the issue here is the quite different one of the compensability of a taking of navigable waters for resale for irrigation purposes when there is some wholly incidental and trivial flood control benefit to commerce. We have found no authoritative decision,[52] but the issue seems clear enough on principle.

It is settled that the Government is not liable when an irrigation project produces an unintended injury, through raising the water level. *John Horstmann Co.* v. *United States*, 257 U. S. 138.[53] It is settled that the Government is not liable when a navigation project produces consequential and unintended injuries, however foreseeable, through the changed regimen of the river. *Gibson* v. *United States*, 166 U. S. 269; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Com.*, 241 U. S. 351; *Danforth* v. *United States*, 308 U. S. 271, 286-287; *United States* v. *Willow River Co.*, 324 U. S. 499, 511.[54] Conversely, when the Government intends to take water for purposes of re-

[52] *Cf. Pike Rapids Power Co.* v. *Minneapolis St. P. & S. S. M. R. Co.*, 99 F. 2d 902, 910-911 (C. C. A. 8).

[53] It is, also, settled that an unintended taking of riparian rights does not afford ground for a Tucker Act suit for just compensation. *Tempel* v. *United States*, 248 U. S. 121, 129-131.

[54] Compare *United States* v. *Archer*, 241 U. S. 119, where the Court remanded for more precise findings, *inter alia*, as to the causal relation between the dyke and the flooding and the predictability of its effects. 241 U. S. at 129, 131-132. (The resulting judgment for Archer, 53 C. Cls. 405, was affirmed by an equally divided Court, 251 U. S. 548.)

sale, its liability should not be defeated because there arose some trivial and consequential benefits to commerce or navigation. Liability depends upon the immediate and intended objective of the Government, and not on remote and consequential injuries or benefits.[55]

3. **An Irrigation Taking Must Be Paid For.** The respondents' water rights, then, in law as well as in fact have been taken from them for irrigation purposes and not for navigation or commerce purposes. See *Kansas* v. *Colorado*, 206 U. S. 46, 85-86; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 425. It follows without more that the Government "may not arbitrarily destroy or impair the rights of riparian owners" by a taking "which has no real or substantial relation to the control of navigation." *United States* v. *River Rouge Imp. Co.*, 269 U. S. 411, 419.[56]

Such was the decision in *International Paper Co.* v. *United States*, 282 U. S. 399. There, in exercise of its war powers, the United States ordered the power company at Niagara Falls to use the water which under conveyance and lease ordinarily flowed past to the paper mill. Mr. Justice Holmes brushed aside an argument based upon the powers of Congress over navigable waters because "the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end" (282 U. S. at 407). So, here, the Secretary of the Interior did not seek to pervert the navigation powers of the Government, but both recognized and paid for the water rights here in question, which he was taking for resale, and not to ad-

[55] The only exception to this rule appears to be the case where the property claimed to have been taken has in fact been benefited by the Government's work in its totality. *United States* v. *Sponenbarger*, 308 U. S. 256. This obviously is not the case here.

[56] See, also, the safeguarding language in the cases denying compensability, that the work be that having, e. g., "some positive relation" to the navigation end. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Arizona* v. *California*, 283 U. S. 423, 455-456; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *United States* v. *Willow River Co.*, 324 U. S. 499, 510.

vance the federal interests in navigation or commerce. See, also, *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63; *United States* v. *412.715 Acres of Land*, 53 F. Supp. 143, 148-149 (N. D. Cal.); *Federal Eminent Domain*, sec. 970.

It seems, accordingly, to be clear enough that the Government gains no immunity because the waters it takes from the respondents to sell to others happen to be navigable.

IV

RESPONDENTS' WATER RIGHTS ARE RIPARIAN RIGHTS, VALID AND PROTECTED BY STATE LAW

The Solicitor General presses upon this Court two issues of state law, each pointing to the conclusion that respondents have no valid water rights under state law and cannot, therefore, recover from the United States for their taking. Each contention is unfounded, and neither requires very extended treatment.

A. State Law Recognizes and Protects Respondents' Riparian Rights to Overflow Waters of the San Joaquin

1. **The Vested Right.** The Solicitor General does not dispute the fact that under the earlier California cases the respondents have a fully vested and protected riparian right to the annual overflow waters of the San Joaquin River. This was squarely decided with respect to the very right to flood-water overflow from the San Joaquin in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, 252 Pac. 607, cert. dismissed, 275 U. S. 486. It has often been decided with respect to riparian rights indistinguishable from those of the respondents; "this court has invariably and consistently held that waters flowing during periods of high water were a part of the natural flow of the stream and could not be classified as either

unusual, extraordinary or unexpected." *Chowchilla Farms Inc.* v. *Martin*, 219 Cal. 1, 33, 25 P. 2d 435. See *Miller & Lux* v. *Madera Canal etc. Co.*, 155 Cal. 59, 99 Pac. 502; *Piper* v. *Hawley*, 179 Cal. 10, 17, 175 Pac. 417; *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 1007-1008.

2. The 1928 Amendment. The Government urges that the 1928 amendment to the California constitution altered this result. That amendment added Article XIV, Sec. 3 of the State Constitution, which provides:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *Provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

This Court is spared the necessity of applying the bare text of this provision, which has its evident ambiguities, to the facts of this case. The California decisions under this amendment are not crystal clear on all issues, but they do show that respondents' rights remain protected after as well as before this amendment. The 1928 amendment has been applied by the California courts to accomplish several important ends, but they have at the same time made plain that it did not serve to abrogate sustantial rights vested prior to its adoption.

The doctrine of beneficial use, before 1928, had no application to a riparian owner who objected to a diversion by an appropriator; the 1928 amendment, however, eliminated the right of a riparian owner to block an appropriation which would invade his technical rights to an unimpaired flow but would do him no practical harm. *Gin S. Chow* v. *City of Santa Barbara*, 217 Cal. 673, 695-700, 705-706, 22 P. 2d 5; *Meridian Ltd.* v. *San Francisco*, 13 Cal. 2d 424, 447, 451, 90 P. 2d 537; *City of Los Angeles* v. *Glendale*, 23 Cal. 2d 68, 75, 142 P. 2d 289. The wasteful use condemned by the Constiution "was the use of water by a riparian owner under an asserted, and therefore protected right to compel the waters of the stream, without any benefit to himself, to flow to a lower level and on to the sea when otherwise a beneficial use could be made of the same." *Meridian, Ltd.* v. *San Francisco, supra*, 447. As the Court said in *Peabody* v. *City of Vallejo*,[37] 2 Cal. 2d 351, 374, 40 P. 2d 486:

> "The preferential and paramount rights of the riparian owner, the owner of an underground and perco-

[37] The Government places great reliance on the *Peabody* case. We do not, in view of the language quoted in the text nor indeed of that last quoted by the Government (Br. 53), see how it aids their case. The cause was remanded to the trial court to determine whether the riparian owners had lost any substantial benefit, with directions to provide a physical solution or damages if they had. The reference to flood and freshet waters, quoted by the Government, is to waters which never returned to the channel.

lating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable."

Again, the 1928 amendment eliminated the earlier rule that the riparian owner had power by injunction absolutely to prevent a much more beneficial appropriation of the water. But it did not deprive the riparian owner of his right to a physical solution or to compensation if the subsequent appropriation damaged a riparian right of the sort previously recognized. *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 374-375, 380, 40 P. 2d 486; *City of Lodi* v. *East Bay Municipal Utility Dist.*, 7 Cal. 2d 316, 337-341, 60 P. 2d 439; *Hillside Water Co.* v. *Los Angeles*, 10 Cal. 2d 677, 686-688, 76 P. 2d 681. Each of these cases dealt with the rights of the overlying landowner to maintenance of the underground water tables, which in California is the equivalent of a riparian right. *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 986. Each of the cases arose with respect to a comparatively "wasteful" use of surface water to maintain the water table.[38] Each recognized the continued validity of the *Herminghaus* rule so far as it fixed the character and compensability of riparian rights. Each, however,

[38] The Government's comment on the *Lodi* case is that the court directed a reasonable physical solution (Br. 55). So it did, but the important thing here is that the right which was protected required "tremendous releases" which "after they serve the purpose of forcing a relatively small quantity of water into the surrounding underground water table, for the most part, waste into the sea" (7 Cal. 2d at 339).

refused to allow the overlying owner entirely to block the challenged appropriation, as he could have done prior to 1928. Instead, each required the appropriator to afford a physical solution, i. e., replacement water, to the overlying user which put the water to a public use, or make compensation to the private overlying water user for his resulting injury.

The 1928 amendment, in short, eliminated the protection given merely technical and non-beneficial uses by the riparian owner and, even in the case of beneficial uses, permitted an appropriation for a higher use upon furnishing a physical solution to the public riparian owner and compensation to a private riparian owner. "The effect of this amendment has been to modify the long standing riparian doctrine announced in the above cases, and the cases cited therein, and to apply by constitutional mandate the doctrine of reasonable use between riparian owners and appropriators and between overlying owners and appropriators * * *. The new doctrine not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian." *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* 3 Cal. 2d 489, 524-525, 45 P. 2d 972. It did not, however, in any way destroy or make non-compensable prior riparian rights which were of a real as opposed to only a technical value. The 1928 amendment gives the riparian owner full protection in "the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes." *Meridian, Ltd.* v. *San Francisco*, 13 Cal. 2d 424, 445, 90 P. 2d 537. The riparian owner must show injury before he can complain of an upstream storage of flood waters, "but such right of storage must necessarily be subordinate to all beneficial uses in the stream made in the exercise of prior appropriative rights." *Id.* 449-450.[59]

[59] Weil, Fifty Years of Water Law, 50 Harv. L. R. 252, 275, points out that more extreme drafts of the 1928 amendment were watered down before enactment. His analysis of the California cases agrees with ours, and does not support that of the Government (pp. 284-290).

In *Chowchilla Farms, Inc.* v. *Martin*, 219 Cal. 1, 25 P. 2d 435, the court in 1933 held that the annual flood waters of the San Joaquin which were put to a beneficial use by the riparian owner could not be diverted by upstream appropriations. The opinion does not discuss the 1928 amendment but the court could not possibly have been unaware of its command. It had, indeed, only a few months before, on the basis of that amendment, denied corresponding protection to a riparian owner not in fact injured by the upstream diversion. *Gin S. Chow* v. *City of Santa Barbara*, 217 Cal. 673, 699-706, 22 P. 2d 5. In *Los Angeles Flood Control Dist.* v. *Abbot*, 24 Cal. App. (2d) 728, 736-737, 76 P. 2d 188, moreover, the court held compensation due for a post-1928 diversion of seasonal flood waters which had for many years deposited merchantable gravel in front of Abbot's lands just before the waters reached the sea; it would follow *a fortiori* that the San Joaquin overflow waters, irrigating the uplands and returning to the river, is a non-wasteful and protected riparian right.

Finally, the very rights here in issue have been fully adjudicated in the California courts, after the 1928 amendment, and have been declared valid riparian rights. *Miller & Lux, Inc.* v. *Madera Irrigation Dist.* (decree Jan. 26, 1933); *San Joaquin & Kings River Canal* v. *Madera Irrigation District; San Luis Canal Co.* v. *Madera Irr. Dist.* (both decisions Dec. 31, 1932) (R. 79-81). These decrees would seem in themselves to settle the nature and application of California law. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 177-180; see, also, *Six Companies* v. *Highway District*, 311 U. S. 180, 188; *West* v. *A. T. & T. Co.*, 311 U. S. 223, 236-238; cf. *King* v. *Order of Travelers*, 333 U. S. 153, 159-162.[60]

[60] The California decrees cited above seem clearly to fall more nearly within the rule of the *Field* case than that of the *King* case. *Field* held the federal court concluded by the decree of the New Jersey trial court of chancery; it had statewide jurisdiction, and its decrees were accessible and accorded the respect of *stare decisis*. The South Carolina Court of Common Pleas in the *King* case had a local jurisdiction, its decisions

3. The Facts Require Affirmance. Wholly apart from the settled California interpretation of the 1928 amendment, the Government cannot by any view prevail on the facts of these cases.

(a). The Government can escape payment for the seized right, under the 1928 amendment, only if it establishes that the annual enrichment of respondents' lands is accomplished by the "waste or unreasonable use or unreasonable method of use" of the water. This is a question of fact. The Court of Claims made no such finding.

As we read the somewhat refined rule as to the burden of proof under the 1928 amendment, the riparian owner in the ordinary case has the burden of showing that his use is not "wasteful," *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 991, and the subsequent appropriator thereafter has the burden of showing that his diversion will not injure the riparian owner, *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 381; *Tulare* case, *supra*, 991. Since a "wasteful" use is simply one that does not benefit the riparian owner, *Meridian, Ltd.* v. *San Francisco*, 13 Cal. 2d, 424, 447, 90 P. 2d 537 (*supra*, p. 51), this means only that the riparian owner must show that the water actually benefits him, and thereafter the subsequent appropriator, if he is to be free to divert or store, must show that the riparian benefits will not be impaired.

Here the Court of Claims has found that the grassland absorbed about one-acre foot of water each year; that the

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were available only by accident, and other state courts felt wholly free to reexamine their results. The California Superior Court decisions are treated with respect in California and, certainly with regard to water rights, are the result of protracted litigation, and are known and accessible to the state bar generally. "The Superior Courts of the State of California while located and functioning in the several counties of the state, are not local or county courts, but constitute a system of state courts, being vested with and exercising the judicial power of the state under the express terms of Section 1 of Article VI of the Constitution." *Sacramento & San Joaquin Drainage Dist.* v. *Superior Court*, 196 Cal. 414, 432, 238 Pac. 687.

excess over this amount returned to the river; that the absorbed water was well below the optimum of 3-acre-feet; and that the absorbed water promoted the growth of grass and other forage (R. 88). It has further found that the Government's taking will wholly eliminate these benefits and that the resulting injury amounts to $9 an acre. It is wholly clear that the Government has not borne its burden of proof.

(b) It is, finally, to be noted that the Government's argument on this score is subject to much the same disabilities as its constitutional argument. Both the administrative and the Congressional authorization of the project contemplated that the riparian rights to uncontrolled grasslands should be purchased; they have in fact been purchased, at a large cost, without denial of liability until this litigation began; and the purchases have been disclosed to and ratified by Congress (see *supra*, pp. 27-35). Even if there were doubt as to the law of California, the Congress and the Secretary of Interior certainly have power to resolve that doubt in favor of fair dealing to the riparian grassland owners who lose their water in order that the Government may sell it for use on non-riparian crop lands. And respondents, here, as in the navigation argument pressed by the Solicitor General, may with some justice complain that the same Government which has agreed to pay Miller & Lux $2,450,000 for water rights which include the identical rights to overflow waters here in issue should not tell the rightful owners that this was a wasteful and therefore a noncompensable right.

B. The Respondents in Nos. 299 and 301 Have Riparian Rights Which Miller & Lux Cannot Sell

The deeds from Miller & Lux, Inc., to Gerlach Live Stock Co. and to Martin Erreca [61] provided (R. 112, 126):

[61] As noted above, *amici curiae* have no interest in the facts of the other four cases.

> This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the Grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs, and assigns, to the extent herein provided.

The Bureau of Reclamation partially accepted the contention of Miller & Lux that it had the right to sell the riparian rights to these lands, and included them among those for which the payment of $2,450,000 was made; it reserved $511,350 in escrow, however, for reimbursement against the event the grantees should be able to establish their claim to the ownership of the water rights (R. 96-97).

1. The Text of the Clause. It is a fair inference from this record that the Miller & Lux water rights clauses were carefully drawn and that choice among the alternatives was or could be a matter of bargaining.[62] It is, therefore, significant that the clauses, simply as a matter of terminology, are in two respects inconsistent with the Government's position.

[62] This record contains four examples of the Miller & Lux water rights clauses. One, that to Potter (R. 106), very plainly protects the grantee against a sale of his riparian rights by Miller & Lux. Two others, that to *Erreca et. al.* (cert. den. No. 238, this Term) and that refused by Potter (R. 107, 121) very plainly attempt to reserve such a power to Miller & Lux. In result, neither party can profitably base an argument upon a comparison of the deeds here discussed with the three other forms shown by this record.

(a) The draftsman, whenever he mentioned the grantee, was careful to include "his heirs, and assigns." If the water rights reserved to the grantor had been intended to include the unusual power to sell the grantee's water for the grantor's own account, one would expect the inclusion of the "assigns" of the grantor. Instead, the rights run to "the Grantor, its successors, subsidiary, and affiliated companies." This looks to use, not to sale; and strongly suggests that the right of transfer was only among the Miller & Lux group of corporations.

(b) The clause carefully distinguishes between "the *riparian* rights of the land herein conveyed" and "the *water* rights of the Grantor." It reserves to the Grantor the right to "use, enjoy and transfer said *water* rights * * * without let or hindrance from the grantee." There is no reserved power to use or transfer "the *riparian* rights" of the grantee. The clause, instead, did no more than it purported to do, which was to estop the grantee from objecting as he might otherwise have done, to the use by Miller & Lux of its own water on lands or by methods which might otherwise be subject to riparian objection.

2. **The Legal Background**. The right to use water on riparian lands is, by California law, more than an easement or an appurtenance; it is a part and parcel of the land. *Lux* v. *Haggin*, 69 Cal. 255, 391-394, 4 Pac. 919; *Irrigation Dist.* v. *Mt. Shasta P. Corp.*, 202 Cal. 56, 65, 259 Pac. 444. The riparian owner has, nevertheless, a limited power to convey the water rights separately from the land for use on either riparian or nonriparian lands. *Yacco* v. *Conroy*, 104 Cal. 468, 38 Pac. 107; *Holmes* v. *Nay*, 186 Cal. 231, 238, 199 Pac. 325; *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 263 Pac. 318, 322; *Forest Lakes Water Co.* v. *Santa Cruz Land Co.*, 98 Cal. App. 489, 277 Pac. 172. That limited power may take either of two forms. The riparian owner in selling a part of his land which, after deed, will not be contiguous to the stream has power to convey with it the corresponding portion of its for-

merly riparian water, and such a conveyance will bind all other riparian owners. *Miller & Lux Inc.* v. *J. G. Jones Co.*, 179 Cal. 689, 178 Pac. 716. The riparian owner may also sell his water rights for use either by another riparian owner or on nonriparian lands, but this conveyance operates only as an estoppel against the grantor and his privies, and does not diminish or alter the rights of the other riparian owners. See *Duckworth* v. *Watsonville Etc. Co.*, 150 Cal. 520, 529, 89 Pac. 338; *Duckworth* v. *McKinley*, 158 Cal. 206, 110 Pac. 927; *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 263 Pac. 318, 322.

Against this background, the clause in issue becomes rather clearer. Miller & Lux did not sell respondents their lands stripped of their riparian rights; the clause expressly states that it is not to be construed as an extinguishment of those rights. It did obtain, however, an estoppel running against the owners of these lands preventing any objection to storage, diversions or uses by Miller & Lux of its own water rights, and it obtained an estoppel against the owners of these riparian lands if Miller & Lux wished to sell its own water for use by third parties on nonriparian lands. These were, or might be, important advantages. But they are wholly unrelated to the power claimed by Miller & Lux to sell the water rights twice, once to respondents and then to the Government.

The Government's construction of the clause is, in truth, an impossibility under the law of California. As the respondents' riparian rights are not extinguished, they remain a part and parcel of the land. Miller & Lux had no power, as against riparian owners generally, to sell even its own riparian rights for use on nonriparian lands. By this clause, respondents are estopped from objecting should Miller & Lux choose to do this. But nothing in the clause suggests that Miller & Lux were attempting to reserve the power to sell riparian rights which it no longer had, which were not used on any lands which it owned, and which were a part and parcel of lands owned by others. Since the

law knows no such thing as a riparian right in the air, unconnected with the use of the water on riparian lands, it is hard to see how any language could serve to sever a riparian right from the lands of which it is a part and on which the water is used, so as to give one who did not own the land a right at will to sell it for use on nonriparian lands.

Most certainly, if any result so extraordinary had been intended the parties would have used words to make it plain. There is a presumption against the severance of water from the land on which it is used. *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539. That presumption applies with treble force here. The clause as it is written has a sensible purpose when construed to ensure the grantor's freedom to make a different use of its own water. It would, under the Government's construction, result in the respondents having purchased the fee title to the land but only a license, terminable at will, to the water which is necessary to its productivity. The clause, as the Solicitor General construes it, would be an effort by Miller & Lux to acquire a floating riparian right, unconnected with any land, which it could use or sell at any time in the indefinite future. Whatever the legal effect of a clause which in fact said what the Government urges this to mean,[63] such extraordinary consequences are surely not to be visited upon these respondents, who were expressly assured that their riparian rights were not intended to be extinguished.

3. The Purpose of the Sale. The water rights clause, finally, reserves to Miller & Lux no power to transfer rights or to store water for diversion out of the San Joaquin River. But Miller & Lux undertook to sell to the United States respondents' riparian rights for the purpose not alone of "storage on the upper reaches of the San Joa-

[63] There are two clauses in this record (R. 107, 121), neither of which is before the Court for adjudication, which undertake to reach so extreme a result. We should suppose, under the California decisions cited above, that the grantees under such clauses would be estopped but not the other riparian owners.

quin River" but for the purpose of diversion entirely out of the San Joaquin River. This is a far different purpose, so far as the downstream users are concerned, than mere storage. The Erreca findings (R. 113) indicate that the grantee might not have been injured at all, had the flood water been merely stored for later release down the San Joaquin, and the Gerlach findings are not specific on this score (R. 127-128). The deed under no construction could be thought to reserve the right to Miller & Lux to divert, or to sell the right to divert, out of the San Joaquin altogether."[64] The Court of Claims, adopting this ground, found it unnecessary to consider the other difficulties petitioner must overcome to sustain its construction of this clause (R. 137-138).

V

THE DATE OF TAKING

A. The Alternative Dates

This litigation presents an unusually long span of time in which, according to one view or another, the date of taking may be fixed. The project was first authorized in 1935 (*supra*, p. 17), and the final and indisputable taking will probably not arise before the final completion of the Friant-Kern canal in 1950.[65] Any one of a number of dates within this 15 year period may, with greater or less plausibility, be selected as the most appropriate time at which to declare that the respondents' rights have been taken. These dates, with our summary comment, follow.

Authorization. The authorization on December 4, 1935, is not enough to amount to a taking before there has been any tangible injury or before any work has begun. *United*

[64] It is conceivable that some of the water diverted out of Millerton Lake may return to the San Joaquin (especially via the Kings River and Tulare Lake) but it is not suggested that any such downstream return would benefit the lands of the respondents.

[65] Feasibility Report, Central Valley Project, H. Doc. No. 146, 80th Cong., 1st Sess., pp. 18, 20, Table V opp. p. 22.

States v. Sponenbarger, 308 U. S. 256, 267-268; *Danforth v. United States*, 308 U. S. 271, 286; see *Bauman v. Ross*, 167 U. S. 548, 596-597; *Willink v. United States*, 240 U. S. 572.

Start of Construction. Construction of Friant Dam began on November 3, 1939 (R. 99). It was, thereafter, reasonably certain that the project would be carried through. There is respectable authority (in each case by way of assumption rather than holding) for the proposition that the landowner can bring suit as soon as the adopted plan has received the earnest of actual work under it. *Peabody v. United States*, 231 U. S. 530, 538; *Portsmouth Harbor Hotel Co. v. United States*, 260 U. S. 327, 329; *Hurley v. Kincaid*, 285 U. S. 95, 103-104. *Danforth* v. *United States*, 308 U. S. 271, 286-287, disposes of this alternative so far as start of the general project is concerned, but it leaves open the possibility that the taking is accomplished at the start of construction of the particular feature which will cause the compensable damage to the lands. That possibility remains open after *United States* v. *Dickinson*, 331 U. S. 745, 749, where the Court said, "we are not called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens." That decision is, however, a clear holding that the period of limitations does not being to run at this point, nor until the damage is complete.[66]

First Storage. The first substantial impoundment of the water occurred on October 20, 1941 (R. 100). The

[66] *Amici curiae* have concluded that the most reasonable of the alternative dates is the first storage for the purpose of diverting the San Joaquin waters to nonriparian lands and have, accordingly, filed suit for a taking as of February 21, 1944. They see no problem, under the *Dickinson* case, in the fact that their suit was filed more than six years after the date selected by the court below.

three-weeks impoundment did not in fact injure the respondents (*supra*, p. 7). The Court of Claims adopted this date as the latest date of taking (R. 141-145). The contract between the Government and Miller & Lux seems rather plainly to have contemplated this as the date of taking, for it puts the $511,350 in escrow against suits "initiated prior to the sixth anniversary after the initial storage or diversion" (R. 96). We know of no federal authority directly supporting the choice of this point of time, but — so far as it is directed to standing to bring suit or interest — consider it a wholly reasonable solution of the problem. It seems, further, to accord with the California rule (Rsp. Br. 29-31).

First Injury. The record does not show when the respondents' lands were or will be for the first time deprived of their overflow water. This date may have been in 1942, when the flood waters exceeded the capacity of the outlets (R. 101). It may very probably have been during the spring of 1944, in the course of the substantial impoundment necessary to raise the reservoir to the outlet of Madera Canal (R. 101). It may have been during any or all of the subsequent years in which Madera has been in operation. It may not occur until the impoundment for or the diversion into Friant-Kern Canal. If the date of first injury were fixed, there would be authority for accepting this date as that of the taking. Most of the older cases speak of the date of taking as the date of actual injury to or invasion of the land. See *Pumpelly* v. *Land Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445, 470; *United States* v. *Welch*, 217 U. S. 333, 338; *United States* v. *Grizzard*, 219 U. S. 180, 183; *United States* v. *Cress*, 243 U. S. 316, 327-328; *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Highsmith*, 255 U. S. 170. They were not, however, directly concerned with the date of taking. But in *Danforth* v. *United States*, 308 U. S. 271, 286, the Court in dealing with intermittent flooding seems to have accepted the date of the first actual injury as the time of taking.

Completion of Construction. Here construction will not be completed until 1950. Several of the cases fix the date of taking as the date the Government construction was completed. In *Jacobs* v. *United States*, 290 U. S. 13, 15, 18, it is not clear whether this was coincident with the actual injury. But in *Court of Marion County* v. *United States*, 53 C. Cls. 120, 145-150, and *Dooner* v. *United States*, 95 C. Cls. 392, 397, the court below applied the rule when the completion of the work preceded the actual damage; in *Marion County* the result was an alternative ground for barring the claim. In *United States* v. *Dickinson*, 331 U. S. 745, 748-749, the Court held that the period of limitation did not run against the owner, before his injury is complete, merely because construction of the project has been finished.

Completion of Injury. It is possible, if Friant-Kern were not completed until after the 1950 growing season, that there would be still another year before the last bit of respondents' water rights were taken. *United States* v. *Dickinson*, 331 U. S. 745, establishes that the period of limitations does not begin to run until after the injury to the land has been completed, and accordingly that suit will not be barred before 1956 or 1957, but carefully leaves open the time beginning with which suit can be brought.

B. The Dickinson Rule

The variety of possible dates of taking indicated above is graphic evidence of the wisdom of the rule in *United States* v. *Dickinson*, 331 U. S. 745.[67] There the Court said (pp. 747-749):

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[67] Dickinson's uplands were flooded by a Kanawha River dam, and he sued under the Tucker Act for just compensation. If his cause of action had accrued before April 1, 1937 (six years prior to suit) or before August 16, 1937 (when Dickinson bought the land; see 152 F. 2d at 866) his claim was barred. The dam had been authorized, construction had been started, and impoundment had begun prior to those dates; the lands had become partially submerged prior to the latter of the dates. The dam was completed 4 days after Dickinson acquired the land, and the full pool level was attained 13 months later. The Court in terms left open the question whether the owner *could* sue at an earlier time, and held he was not barred until the taking had been completed.

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken." The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy. • • •
>
> • • • The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" — when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. • • • The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. • • •
>
> When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. • • • we are fortified by the fact that the two lower courts reached the same conclusion on what is after all a practical matter and not a technical rule of law.

Under the *Dickinson* case the court below took an entirely reasonable date from which to compute interest. It is highly probable that the respondents' lands lost most or all of their market value, so far as these depended upon riparian rights, when the project was authorized in 1935. At all times since the start of construction in 1939, they have had whatever overflow water has in fact reached the lands only by sufferance, and on terms which forbade sale or long-term planning. And certainly the Government,

which bought these very water rights — although from the wrong person — in the summer of 1939, is hardly in a position to claim error or injustice when the court below awarded the rightful owner interest from the fall of 1941.

CONCLUSION

For the reasons set out above, we respectfully submit that the decision below should be affirmed.

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IN THE

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v.

MARTIN ERRECA

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v.

JAMES J. STEVINSON, *a Corporation*

UNITED STATES OF AMERICA, *Petitioner*

v.

ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*

v.

3-H SECURITIES COMPANY

On Writs of Certiorari to the Court of Claims

SUPPLEMENTAL BRIEF FOR GILL, ET AL., AMICI CURIAE

A. E. CHANDLER
Balboa Building
San Francisco, Cal.
WARNER W. GARDNER
Walker Building
Washington, D. C.

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SUPPLEMENTAL BRIEF FOR GILL, ET AL., AMICI CURIAE

This brief is designed to bring up to date the administrative and statutory material bearing on the issues before this Court and to supply brief answer to a number of the contentions made by the Government in its two briefs

in reply to the briefs filed on original argument. We shall, for the possible convenience of the Court, follow the headings and numeration used in our main brief.

II

CONGRESS HAS DETERMINED THAT IRRIGATION RIGHTS, VALID UNDER STATE LAW, MUST BE PAID FOR WHEN TAKEN BY A RECLAMATION PROJECT.

A. The Reclamation Laws Generally

2. *Water Rights Taken By a Reclamation Project Must Be Paid For.* The Government's Supplemental Brief (pp. 26-27, 32-36, 38-40) introduces a fair degree of confusion by assimilating the issue here — the compensability of vested irrigation rights based on navigable waters — to the different issue of the power to obstruct navigable waters.

The Act of March 3, 1899 (30 Stat. 1151, 33 USC Sec. 403)[1] forbids "the creation of any obstruction to the navigable capacity of any of the waters of the United States." Any structure which in fact obstructs or impedes navigation is thereby forbidden. So, too, is any diversion of navigable waters which as a matter of fact — not theory — "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *United States v. Rio Grande & L. Co.*, 174 U. S. 690, 709;[2] see *Sanitary District of Chicago v. United States*, 266 U. S. 405. A structure or a diversion which does not in fact offer substantial interference to actual navigation is not unlawful, and need not be authorized by Congress or by

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[1] Identical in the respects significant here with the Act of Sept. 19, 1890 (28 Stat. 454) considered in *United States v. Rio Grande Irrigation & L. Co.*, 174 U. S. 690.

[2] The contemplated dam across the Rio Grande, as the case came to this Court, would have virtually dried up the Rio Grande for 300 miles down stream, would have given a private corporation control of the entire flow of the river, and would have obstructed actual navigation all the way to the mouth of the river. 174 U. S. at 691-692.

the Secretary of War. This is evident from the words of the statute and has been stated as the policy of the Corps of Engineers. See *Converse v. Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981, 986 (C. C. A. 4), cert. den. 260 U. S. 724.

The navigability of the San Joaquin above Stockton has been of no practical importance since 1871 (*infra*, pp. 19-20). However, the theoretical navigable capacity of the River has without question been diminished by an accumulation of water diversions each of which is insignificant in itself. There is no occasion in these cases to develop the validation of these diversions[3] for these cases deal with riparian not appropriative rights, with overflow not diverted waters, and the Government does not suggest that the Congress has made it unlawful to receive water placed on the land by the river itself. There will, in fact, probably never be an occasion for this or any other Court to consider the compensability of rights to divert the San Joaquin's ordinary flow. The policy of the Bureau of Reclamation is to replace all irrigation rights based upon ordinary or low-water flow of the San Joaquin and to purchase only the grassland rights which are based upon the flood waters. The Government cannot — at least without unravelling much of its constitutional argument — contend that the diversion of flood waters "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact."

The issue here, to repeat, is the compensability of riparian irrigation rights taken by the Government in order to sell the water to other persons on other lands. As the

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[3] The Government attempts (Sup. Br. 38-40) to show the contrary by a proposal from the district engineer, in 1917, that Congress allow free diversion of the San Joaquin waters for another 28 years and then reexamine the situation. But, as the Government points out, even this modest proposal was rejected by the Board of Engineers, because it felt no objection should be taken to the irrigation diversions. See *infra*, p. 19.

water right is vested under state law, Section 8 of the Reclamation Act of 1902 (38 Stat. 388, 43 U. S. C. Sec. 383) requires compensation for its taking. Since the Government no longer suggests that state law cannot, even as among private persons, apply to navigable waters (Sup. Br. 54), Section 8 is wholly applicable.

The Government seeks to escape the force of Section 8 by erecting an unusual identity between appropriative rights and beneficial use (Sup. Br. 36-38). Section 8, of course, prescribes beneficial use as the basis and the measure of water rights in reclamation projects. Appropriations, of course, are in California as in other states valid only if put to a beneficial use. But these premises afford no foundation for the Government's sidewise jump to the extraordinary conclusion that riparian rights cannot be put to a beneficial use. In California as elsewhere, after as well as before the 1928 amendment, riparian rights put to a beneficial use are protected: the law "not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian." *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 525, 45 P. 2d 972; *Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 445, 90 P. 2d 537.

Finally, it should be noted that in none of its three briefs does the Government cite a single case in direct support of its construction of Section 8, and in none does it deal with or even mention the decision of this Court in *Mason Co. v. Tax Commission*, 302 U. S. 186, 199-203, where Chief Justice Hughes went to much pains to explain just what the Secretary of Interior had to do and had done to gain control under state law of the navigable waters of the Columbia River. See, also, *First Iowa Coop. v. Power Com'n*, 328 U. S. 152, 158, 175-176 (*infra*, note 11).

4. *The Administrative Practice.* It is perhaps well to note the posture of the controversy as to the practice of the Bureau of Reclamation in applying Section 8 of the

Reclamation Act. The Government in its main brief relied upon a 1905 decision of the Secretary of the Interior which did not consider or mention Section 8 (pp. 69-70). We attempted to show that this decision was irrelevant to the issues here, quoted a categorical statement of the Bureau of Reclamation in 1945, and showed the Bureau's recognition in its basin planning of the irrigator's right to replacement water. In its reply brief (p. 6), the Government disputed our conclusion only because counsel for the State of Arizona, in litigation against the Government, argued to this Court in *Arizona v. California*, 283 U. S. 423, 439, that the Boulder Canyon Project would not protect the State's control of the waters of the Colorado. The Government overlooked the decision of this Court in that very case, where it pointed out that Section 18 of the Boulder Canyon Project Act (45 Stat. 1057, 43 U. S. C. Sec. 617), which is broadly similar to Section 8 of the Reclamation Act, protected the state's rights to those navigable waters and therefore make baseless the claim of anticipated injury. In its supplemental brief (p. 42-44), the Government again ignores the categorical statements of the Department of the Interior and the Commissioner of Reclamation (*infra*, pp. 11, 23-24) and seeks to establish an administrative practice only by taking inaccurate[4] issue with our administrative citations (main brief, p. 26) from collateral fields. We submit that it has

[4] The only citation of real significance to either side was *Theodore A. Iasigi*, 39 L. D. 285, which held that Colorado River diversions in actual use were valid for a desert land entry. The decision held just that. The Government seems to have been misled by the fact that patent to another tract of Iasigi's was rejected in the same opinion because Iasigi had insufficient water. Our use of *Underground Water Claims*, Utah, 55 L. D. 378, has no relevance now that the Government has receded (Sup. Br. 54) from its earlier (Br. 68, 47) suggestion that state water laws are wholly inapplicable to navigable waters. For the rest, the Government seeks to convict us of error by noting that the decisions on their facts did not or might not have involved navigable waters, which we have never disputed.

not managed to raise a substantial doubt as to the administrative practice under the reclamation laws generally.

B. The Central Valley Project.

1. *The Authorizations.* We developed in our main brief (p. 28) that the administrative authorization under the reclamation laws specifically called for "the purchase of water now used for the irrigation of pasture lands" and the legislative reauthorization authorized the acquisition of water rights by eminent domain or otherwise. The Government makes a determined effort to escape the force of those provisions.

(a) The Government seeks to minimize the administrative authorization by the unwarranted assertion (Sup. Br. 16, 36) that the Secretary and the President cannot proceed with an administrative authorization under the reclamation laws when navigable waters are involved. It is true that in 1905 the Secretary asked Congressional authority to dam the upper Yellowstone River, but it was asked and granted only "in order that there may be no question as to the authority of the Secretary" (Govt. Sup. Br. 35). But since 1905 much navigable water has flowed over reclamation dams. Congress since 1905 has three times clarified and strengthened the procedure for administrative authorization of reclamation projects, and in no case was there any exception of navigable waters. Sec. 4, Act of June 25, 1910, 36 Stat. 835, 43 U. S. C. Sec. 413; Sec. 4(B), Act of December 5, 1924, 43 Stat. 702, 43 U. S. C. Sec. 412; Sec. 9(a), Act of August 4, 1939, 53 Stat. 1187, 43 U. S. C. Sec. 485. The latest act, indeed, makes it indisputably clear that the administrative authorization reaches to navigable waters, for in Section 9(b) it provides authority and procedure for allocating part of the cost to navigation benefits. Even before its enactment, this court in *United States v. Arizona*, 295 U. S. 174, 187-188, had left it, we would have thought, wholly clear that the

1910 Act itself was sufficient basis for an administrative authorization of projects involving navigable waters.

(b) The Government (Sup. Br. 17-18) urges that the authorization to condemn water rights in the legislative reauthorizations in 1937 and 1940 carries no implication that Congress considered them compensable. Concededly, the Congress has on a number of unrelated occasions authorized special suit or condemnation without admitting liability by the jurisdictional enactment. But when the Congress reauthorizes an administrative plan calling for the purchase of water rights, authorizes their purchase or condemnation, and over a 14 year period appropriates more than $5,000,000 for their purchase, it is a fair inference that the Congress intended the rights to be purchased.

(c) The Government does not and cannot deny that these authorizations relate to the waters of the San Joaquin. It seeks, however, to imply the contrary by the statement that water rights on many non-navigable streams will

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[8] We have not, in view of the clarity of the 1939 statute, undertaken any comprehensive survey. It appears, however, that the Secretary has proceeded without Congressional authorization in the following projects involving navigable waters of the United States: Truckee-Carson (Lake Tahoe); Central Valley ("reauthorized" after 2 years by Congress to transfer Army Engineer funds; see our main brief, p. 17); Yuma (Colorado River, see *United States v. Arizona*, 295 U. S. 174, 184-186); Davis Dam (Colorado River); Marshall Ford (Colorado River, Texas). Other projects involving navigable waters have been specially authorized by Congress for a variety of special reasons which would be profitless to pursue here. See, for a general statement of the executive policy to forego the administrative authority and obtain Congressional authorization in the case of large and important projects, Commissioner Straus before the House Appropriations Committee for F. Y. 1950, 81st Cong., 1st Sess., Pt. 2, pp. 182-185.

The Government's confusion between a legislative authorization and an appropriation (Sup. Br. 16) seems to need no argument in reply.

be directly affected by the project (Sup. Br. 18-19). The statement is quite erroneous.[6]

(d) Finally, the Government says that since Congress could not have intended to authorize purchase of *some* rights of ways,—those reserved under the Act of 1890—it could not have intended in the same phrase to authorize purchase of *any* water rights (Sup. Br. 19-20); the fallacy is patent.

2. *The Practice.* Since the first argument of this case the Congress has again dealt with the annual appropriation for the Central Valley Project.

F. Y. 1950. The Bureau advised the Congress that a project total of $6,150,000 would be required for the purchase of water rights and requested $175,000 for 1950. It noted that a total of $5,377,498 would have been spent for the purchase of water rights by June 30, 1949. Hearings, Pt. 2, p. 281. The appropriation bill (H. R. 3638, 81st Cong.) carried $53,550,000 for the project generally as passed by the House and $60,789,890 as passed by the Senate.

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[6] We suppose that a project of this magnitude must necessarily produce unexpected or collateral consequences outside the beds of the two rivers directly involved. One example is cited by the Government: a claim by Redding that Shasta Reservoir unduly cooled the municipal swimming pool. However this may be, we think it entirely plain that the authorizations contemplated only the purchase of the San Joaquin water. *Pitt River Power Co. v. United States*, 98 C. Cls. 253, cert. den. 319 U. S. 747, is the only citation in support of the contrary assertion by the Government. The Pitt River is a tributary of the Sacramento and its uplands were partially flooded by Shasta Reservoir. The power company brought premature suit for flooding of its *lands*, with one unexplained paragraph mentioning undescribed riparian rights to those lands. The Fresno Slough carries the water of the Kings River to the San Joaquin at Mendota; Miller & Lux by the 1939 contracts was to be given exchange water for its Fresno Slough rights; and no issue of purchase of non-navigable or navigable waters was involved except as the Government concedes our point (main brief 29) that the entire $100,000,000 diversion of the Sacramento, to replace San Joaquin water, is in satisfaction of San Joaquin rights.

1936-1950. The Government attempts to avoid this 14 year history of disclosure and ratification by appropriation along five paths:

(a) It implies that the Congress did not have "full knowledge" (Reply Br. 10-11, Sup. Br. 29, 46). We should ourselves hesitate to suggest that the Congress would appropriate more than $5,000,000 over a 14 year period without knowing what it was doing. With this new contention of the Government in mind, the Appendix to this brief supplements our original presentation—confined largely to the official budget presentation and Congressional action—by excerpts from testimony offered, in half a dozen years, before the House Appropriations Committee, by the Commissioner of Reclamation, by the Regional Director of Reclamation, and by (or in their behalf and presence) twenty members of Congress. We do not believe the Government is entitled to deny that Congress was fully advised that the Bureau was as a matter of course buying water rights to the San Joaquin grass lands.

(b) The Government next suggests that the Department of the Interior wished the funds, and Congress appropriated them, in order that they might be used to avoid injunction suits "by 'large' and 'influential' interests", and payment made "where to do so would advance other interests of the Government." (Reply Br. 10, Sup. Br. 44). It is not necessary to assay the morality of any such policy, for the Commissioner of Reclamation in the passage cited by the Government testified to just the opposite policy: He recognized that the Bureau *must* buy *all* San Joaquin water rights. He explained that the Bureau was buying them *before* their taking, rather than after, because they feared that large and influential interests might otherwise by litigation tie up construction indefinitely. This is far different from a statement that only those interests would be paid, or even that the pay-

ment was to be made only out of fear of litigation. The full text of the relevant parts of the colloquy are quoted in the Appendix (*infra*, pp. 23-24).

(c) The Government then fastens upon the accidents of appropriation structure, and asks that weight be put on the fact that Congress did not often use statutory language so detailed as to specify "water rights." (Sup. Br. 20). The shifting trends between detailed and general appropriation are well illustrated by these statutes,[7] but it is perfectly plain that the Congress considers that it has acted on, and thereby limited executive discretion to, the detailed justification which lies back of the general appropriation. See, as to the Central Valley Project itself, the catechism included in the hearings for F. Y. 1950 before the House Committee on Appropriations, Pt. 2, pp. 286-287.

(d) A further attempt to escape this 14-year history is to assert that even though Congress has known of and has appropriated for these purchases, respondents are not aided because Congress can direct payment to some but not to all (Sup. Br. 44-46). *United States v. McDougall's Adm'r*, 121 U. S. 89, which receives heavy reliance by the Government, itself points the fallacy in the Government's argument. We do not urge that because Congress and the executive have paid Miller & Lux and the Chowchilla Farms, several millions of dollars, they must also, for that reason alone, pay these claimants. Congress can honor *particular* claims—a phrase three times repeated in the first paragraph of the *McDougall* opinion quoted by the Government—without creating a general lia-

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[7] See our main brief, pp. 29-32. For F. Y. S. 1937-1940, and again in F. Y. 1950, there was one general appropriation for the "Central Valley Project". Considerable detail was used for F. Y. 1944, and a middle ground, dividing off irrigation facilities generally, for F. Y.'s 1947-1949. See, generally, Commission on Organization of the Executive Branch of the Government, Report on Budgeting and Accounting, 12-13; Task Force Report, Appendix F, 48, 77-78.

bility. But, as the *McDougall* case itself makes clear, if the Commissioner in that case had been granted general authority to purchase beef for Indians, and if he had for 14 years asked and after annual justification been granted appropriations to pay for beef for California Indians, this history would be conclusive that the Congress intended to recognize a general liability to all who sold beef for that purpose.

(e). The final effort by the Government to explain away this administrative and legislative history is to insist that none can be paid beyond the limit of the available appropriation (Sup. Br. 21-22). Of course we do not urge that Congress has appropriated specifically for these respondents, and that they may be paid forthwith; we urge instead that it has consistently recognized the Government's liability to all those so situated. The appropriation of specific funds will come when the Court of Claims judgments are presented to the Congress.

We quoted in our main brief (p. 33) the following categorical statement in the Comprehensive Plan for the Central Valley Basin, distributed by the Department of the Interior in 1945:[8]

> "In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure.

[8] We might have added the following from that report (Comprehensive Plan for Water Resources Development, Central Valley Basin, California, U. S. Department of Interior, Bureau of Reclamation: Planning Report No. 2-4.0-3, Nov. 1945, pp. 20-21):

"This basin report on the Central Valley is predicated on such a policy [that above quoted]. * * *

In addition to respecting all existing water rights, the Bureau in this report has complied with California's "county of origin" legislation * * *."

The Government, though this is obviously the most relevant published statement of administrative practice, has ignored it in all its briefs. That statement has neither been withdrawn nor revised in consequence of the position taken by the Department of Justice in these cases. To the contrary, the following developments have occurred or been made public during the past summer. On December 1, 1947 (one month before these cases were argued in the Court of Claims) the Regional Director submitted a revised report and plan in consequence of comments from California and several Federal agencies. The exact language quoted above was repeated, as the first paragraph of the section entitled "Water, Land and Power Policies," (par. 70) and an estimate of $1,100,000 was offered as the amount required to complete purchase of water rights *from the San Joaquin* (Table 3, p. 30). On July 29, 1948 (two months before the Government's petition was filed in these cases) the Secretary of the Interior approved the report and plan and transmitted it to the President with the statement that unless he had objection it would be tranmitted to the Congress in accordance with the provisions of the Reclamation Laws. On August 15, 1949 (about one month before the Government's brief on reargument was due) the President authorized submission of the plan to the Congress. On August 29 the Secretary submitted the Plan to the Speaker and the President of the Senate.[9]

We direct the Court's attention to the somewhat unusual fact that nowhere in its three briefs does the Government directly say what the administrative practice has been. Nowhere in its three briefs does it directly deny that the administrative practice in the Central Valley has been that stated by the Commissioner and Regional Direc-

[9] All reports mentioned have been released to the public by the Department of the Interior. The Secretary in his letter of August 29, 1949, requested that they be printed as a House or Senate document and this presumably will be done in the near future.

tor of Reclamation. This is a simple issue—what in fact has been the Department's practice—and deserves simpler treatment than it has received. Finally, we do not see—on the issue of administrative policy and practice—that the Department of Justice has standing to present to this Court contentions which are opposed to the statements submitted to the Congress by the Department of the Interior with the approval of the President.

C. The Statutory Promise Is Ground for Suit

The Government in its supplemental brief (pp. 8-15) presents an elaborate argument based upon the technical jurisdiction of the Court of Claims. In effect, it asks that this Court hold that the Congress has authorized the Government to buy or to condemn these riparian rights, if the officials buy from the wrong person (Nos. 4-6) or if they offer too little (Nos. 7-9), the owner is helpless and cannot sue.

Jurisdiction fails, the Government urges, because there has been no explicit *direction* to pay, but instead merely an authorization (Sup. Br. 8-10). This, says the Government (Sup. Br. 11-14) reflects the need that the Congress determine whether a moral or honorary claim should be paid by executive or judicial procedure, whether there should be a time limit on filing, whether there should be interest, and who shall be the beneficiaries. It cites a very large number of cases and statutes which have exemplified this Congressional caution. The discussion is beside the point.

In the first place we do not see that any of those procedural details would have been clarified if the Congress had added the two words "and directed" which the Government says are crucial.

In the second place, so far as these procedural incidents are concerned, there was no occasion whatever to spell them out. The purchase, condemnation or taking, with

liability over, of land or water rights is a daily occurrence. There would be neither need nor occasion for legislating a procedural system to acquire irrigation rights to navigable waters when it was already in operating existence with respect to land, rights of way, water rights and all other forms of property; it was necessary only for Congress to determine that the Government should not take irrigation rights—whether based upon navigable or non-navigable waters—without compensation. It is significant that of the many cases and statutes cited by the Government, where a liability beyond the constitution was created, only *United States v. Alexander*, 148 U. S. 186, dealt with condemnation of property (and that with damage rather than taking); the procedural system there established was necessary prior to the settling of the Court of Claims jurisdiction in *United States v. Lynah*, 188 U. S. 445.

The Government, although professing (Sup. Br. 9) to deal with "all of the cases cited in the brief for the claimants (pp. 34-35)", ignores the three which we believe to contradict its argument. *United States v. Lynah*, 188 U. S. 445, may be dubious constitutional authority as to when land is taken by flooding but the jurisdictional branch of that opinion had never been questioned. There the Court recited eight acts appropriating funds for the improvement of the Savannah River, one statute directing a survey as to the cause of, and the cost of protecting against, the damage to the river bank in question, and a general statute authorizing the condemnation of "land, right of way, or material". The Court continued (188 U. S. at 467):

> "Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears, not only that Congress was making appropriations from year to year for the improvement of the river, but also that it had express

> notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the water way; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way, and material which might be necessary for maintaining, operating, or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.
>
> This brings the case directly within the scope of the decision in *United States v. Great Falls Mfg. Co.* 112 U. S. 645."

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, the Court found a contract implied in fact to pay for land and water rights taken by a dam across the Maryland channel of the Great Falls of the Potomac; it placed substantial reliance on the appropriation, made after disclosure of the company's claim, to pay all existing liabilities.[10] Judge Cardozo, in *Oswego & Syracuse R. R. Co. v. State*, 226 N. Y. 351, 124 N. E. 8 (cited with approval in *Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369, 377) sustained the jurisdiction of the New York Court of Claims over a suit to recover the costs of removing an existing bridge across the Barge canal and replacing it with a bridge which complied with the new requirements. The state by general law and by the terms of the permit could have required the removal of the old bridge without compensation. The legislative direction that "new bridges shall be built over the canals to take the place of existing bridges wherever required" was sufficient to give the Court of Claims jurisdiction under a statute conferring it with respect to suits based upon an "appropriation by the state

[10] The decision was in 1884. No attention was directed in the opinion to the compensability of water rights in the navigable stream. But in 1884 the jurisdiction of the Court of Claims over a taking of land was at least as doubtful as the Government would have its jurisdiction in these cases.

of any lands, structures, waters * * *". So here, the much more specific undertaking to pay for riparian rights on the San Joaquin permits suit upon a statutory promise clearly made.

Again, the Government argues (Reply Br. 10, Sup. Br. 44) that the administrative and legislative authorizations, and the 14 year history of ratification by appropriation, are merely grants of discretionary authority to reward those from whom the Secretary of Interior wished to purchase the water rights, and that the Court of Claims jurisdiction must fall for want of words expressly stating that he *must* pay for all water rights taken. We should suppose that nothing short of unmistakable language would be enough to lead a Court to say that Congress intended to give the Secretary a discriminatory power to make payment to some and to refuse payment to others similarly situated. Certainly the Congress, so far as we know, has never granted so extraordinary a power to an administrative official. Surely, if the Congress intended payment to some it must have intended payment to all. And if the Congress intended payment to all, the Congressional "direction" which the Government feels necessary has been found. We note, too, that whatever discretion the Congress might be argued to have conferred is that of the Secretary of the Interior and not that of the Attorney General. The Secretary has determined that compensation should be made for these water rights—as for all other vested water rights taken by the Central Valley Project; the respondents are in court only because, having determined to pay for the water rights, he paid the wrong person or could not agree with the owner as to the price.

Finally, even if one were to indulge the Government in its belief (Sup. Br. 9) that plain Congressional intent cannot take the place of mandatory words such as "authorized and directed," the specific direction has been on

the statute books ever since 1902. Section 8 of the Reclamation Act states that the Secretary "shall proceed in conformity" with state laws, and that nothing in that Act is intended "to in any way interfere with the laws of any State * * * relating to * * * water used in irrigation, or any vested right thereunder". We have shown that Section 8 recognizes these riparian rights, which are vested under state law, and that the Secretary is directed not to depart from state law or to interfere with those rights. The long history of authorization and appropriation for these rights has always, therefore, not only been a plain direction in itself but also has been built upon the plain and the verbal "direction" of Section 8 as well.

III

VALID IRRIGATION RIGHTS ON THE SAN JOAQUIN COULD NOT BE SEIZED WITHOUT COMPENSATION EVEN BY WORK OUTSIDE THE RECLAMATION LAWS

A. The Navigation Immunity Does not Reach to the Seizure of Irrigation Water.

2. *The Western Water Right.* We set out in our main brief (pp. 38-42) a long series of statutes which indicated that the Congress, when it has been legislating with specific reference to the western waters, has in a very large number of instances subordinated navigation interests to those of irrigation. We urged, accordingly, that the basis for the costless taking of navigable waters—that there can be no property right as against the paramount navigation interests of the United States—was inapplicable to irrigation rights in the seventeen Western States. There has been no comprehensive declaration by the Congress which proclaims this as a universal rule in every situation, but we adhere to the belief that Congress has so frequently acted in particular types of cases that there is no important gap in the over-all protection, and certainly no doubt as to the over-all policy of the Congress. The Government makes a series of limited attacks on the

flanks of this argument, but leaves the central Congressional policy unscathed.

(a) It is unnecessary to follow the Government (Reply Br. 3-4, 7-9, Sup. Br. 31-33, 40-41) into its detailed contentions as to the exact force of the Act of 1866, the Act of 1891 or the Federal Water Power Act.[11] It is unimportant in these cases whether they go as far as we say they do or, as the Government says, not quite so far; they show in either case a lively solicitude on the part of the Congress that the western irrigator should not have his life's work subjected to a costless seizure in the name of navigation work.

(b) The Government (Sup. Br. 33-34) correctly points out that Congressional action was necessary to authorize a major diversion from the Sacramento River, and that conditions were imposed to "prevent serious injury to the navigable stream." This is but another application of the *Rio Grande* rule, and is irrelevant to an irrigation diversion which does not affect navigable capacity (*supra*, pp. 2-3). The irrigation diversions from the San Joaquin, as we have already shown (p. 3), are not present in the case of these riparian owners, and the nice theoretical

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[11] We note, to avoid any thought of agreement by silence; (a) the Government, by showing (Reply Br. 3-4) that the 1866 Act protected the appropriator and left the riparian rights where they stood, does not destroy the showing of a purpose to protect the irrigator; the Government apparently does not urge that the Act is inapplicable to navigable waters (cf. our main brief, 39). (b) We are unable to see that the fact that the 1891 Act did not transfer power to approve an obstruction to navigable capacity from the Secretary of War to the Secretary of the Interior (Govt. Sup. Br. 32-33) has any bearing on its stated purpose in the limited field of rights-of-way to leave untouched state control of irrigation rights. (c) The Government somehow reads the opinion of this Court in *First Iowa Coop. v. Power Commission*, 328 U. S. 152, as showing that the clause is meaningless except as it limited the powers of licensees (Sup. Br. 41). But this Court, drawing explicit analogy to Section 8 of the Reclamation Act, said that Section 27 did not preserve state regulatory authority over power projects because its effect "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water used in irrigation . . . ." 328 U. S. at 175-176.

question which they present—the compensability of rights based upon a non-injurious diversion which, added to hundreds of others, has in fact obstructed navigable capacity—will probably never be litigated. The Corps of Engineers has, however, for many years faced this problem. We are unable to see that its solution gives the Government any support (see Govt. Sup. Br. 38-40). On the Government's own showing, the district engineer in 1917 proposed to authorize all irrigation diversions for 28 years in the future and then to reexamine the situation, while the higher authorities in the Corps thought any action at all to be unnecessary. Some of the passages from the report which were omitted by the Government should be added to explain this apparent indifference to the San Joaquin navigation (H. Doc. No. 332, 65th Cong., 1st Sess.):

"The survey develops the following pertinent facts:

(a) The paramount interest in this valley is irrigation rather than navigation.

(b) There is insufficient water, even if economically used, to supply the area that may ultimately become available for irrigation, estimated at about 1,000,000 acres.

(c) There is insufficient low water flow for navigation above San Joaquin bridge [about 16 m. above Stockton]. (pp. 2-3).

"* * * The conclusions of the district officer are as follows: First, That navigation can not now, nor can it for many years in the future, if ever, be extended to a point on the San Joaquin River at or near Herndon by any method or for any period annually, to secure a benefit from such navigation even approximately commensurate with the cost of the improvement.

"* * * The cessation of navigation of the river above the Mendota Dam appears to be quite definitely fixed at 1870 or 1871. During these years important events in the development of the San Joaquin valley occurred. In 1870 and 1871 railway transportation was extended

from Stockton to Mendota and Friant, respectively. Since 1871 water has been continuously diverted for irrigation from the San Joaquin River (p. 25).

(c) The Government (Sup. Br. 42) confuses the occasional enactment that the United States then has and never will have any commerce clause interest in a given stream with the quite different and more limited purpose of recognizing vested irrigation rights based upon navigable waters. We do not suggest, for one example, that the Federal Power Commission has lost or should surrender its licensing and regulatory powers on the San Joaquin (cf. Govt. Sup. Br. 40). We do say that Congress has ensured that nothing in that or any other regulatory scheme should destroy irrigation rights vested under state law.

(d) The Government (Sup. Br. 51-52) taxes its opponents with their failure to cite *Continental Land Co. v. United States*, 88 F. 2d 104, 109 (C. C. A. 9), cert. den. 302 U. S. 715, and *Washington Water Power Co. v. United States*, 135 F. 2d 541 (C. C. A. 9), cert. den. 320 U. S. 747. These cases deal with water power rights—the right to the flow of the stream—not with the irrigation, domestic, industrial, municipal and stock uses commonly described as "beneficial". Not one of the federal statutes upon which we rely has undertaken to protect power uses of navigable waters, and they remain in the west as in the east wholly subordinate to the navigation powers of the United States. The Government's suggestion of policy that power uses, because non-consumptive, should be superior to beneficial uses is not likely to be endorsed either by the Congress or by those responsible for the water and power policies of the Executive Branch of the Government.

(e) We quoted in our main brief (p. 41) Section 1(b) of the Flood Control Act of December 22, 1944 (58 Stat. 887) which provides:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

We noted that it had been incorporated, in terms or by reference, in every subsequent flood control or rivers and harbors act. The Omnibus Rivers and Harbors and Flood Control Act of 1949 (H. R. 5472, 81st Cong.) now pending action by the Senate contains the same provision. The Commission on Organization of the Executive Branch of the Government, in its exceedingly able Task Force Report on Natural Resources, Appendix L, states (p. 87) that this enactment is in recognition of the principle that:

> The consumptive use of water resources of the West is governed by water rights established under State law and by interstate and international compacts. It is essential therefore, that action by Federal agencies comply with local, State and interstate rights and interests, and that State agencies participate in Federal development projects as far as their resources will permit.

CONCLUSION

For the reasons set out in our main brief, as supplemented herein, we respectfully submit that the judgments of the court below should be affirmed.

A. E. CHANDLER
Balboa Building
San Francisco, Cal.

WARNER W. GARDNER
Walker Building
Washington, D. C.

October, 1949

APPENDIX

Excerpts From Hearings Before Subcommittee on Interior Department, House Appropriations Committee

F. Y. 1938

A California delegation appeared before the Subcommittee; it included Representatives Lea, Buck, Englebright, Havenner, Welch, Carter, Tolan, McGrath, Gearhart, McGroarty, Voorhis, Kramer, Ford, Costello, Golden, Scott, Sheppard, and Izac.

REPRESENTATIVE LEA: • • • We have with us Mr. Edward Hyatt, who is State engineer of California, and for many years he has studied and been familiar with this project. He perhaps more than anyone else here, so far as Californians are concerned, is prepared to explain the project or answer any questions that the members of the Committee may care to ask him in reference to the subject. (p. 1588)

MR. HYATT: "The Project involves the purchasing of water rights on second class land, pasture land, so that its immediate effect will be to retire 250,000 acres of submarginal land." (P. 1588)

REPRESENTATIVE BUCK: "• • • Now, it has taken a long time, seemingly, to go out and negotiate with the owners of the water rights along the river, because this water in California is subject to two laws: Appropriation, which is the general law of the West, and riparian rights, which are also recognized in California. Both of these have to be taken into consideration, and in many cases, both kinds of owners have to be compensated in order to secure the Friant Dam and other reservoirs that may be built.

I am advised that these negotiations are practically at an end. I am advised that, if the money is forthcoming in the next fiscal year, the Bureau of Reclamation will be able to proceed and start the construction of the Friant Dam, building the Contra Costa Canal, and do some pre-

liminary work in connection with the removal of the railroad and secure the right of way at Kennett Dam." (P. 1605)

REPRESENTATIVE ENGLEBRIGHT: • • • There have been many legal questions to be taken care of such as water rights, and so forth. (p. 1611)

F. Y. 1940 (italics added)

MR. JOHNSON: What is the status of the Friant Dam now?

MR. PAGE [Commissioner of Reclamation]: It has not yet been started.

MR. RICH: What was the difficulty?

MR. PAGE: *The difficulty was that the water which is expected to be impounded at Friant Dam has been acquired by prior rights down the river. It was necessary to buy out some of the rights and to arrange for substitution of Sacramento River water and to satisfy others in the situation.* This is a very complicated problem in California, where water rights have been the subject of litigation for 75 years (p. 426).

• • • •

MR. CARTER: This Friant Dam has been delayed for some considerable time, has it not?

MR. PAGE: Yes. It has been delayed because of the water right negotiations for a matter of some 4 years. (p. 428)

• • • •

MR. FITZPATRICK: You say they are looking for the water, at the same time they do not like to give you the water rights without compensation?

MR. PAGE: *Well, the water rights belong to others than the beneficiaries of the San Joaquin Valley project,* and the reason for the prolonged negotiations is primarily because the interests which control these water rights are so large, and so influential, that if litigation had been

started, it was feared that it would have tied up that end of the project indefinitely, but it was felt necessary to work out these problems in advance of construction.

MR. FITZPATRICK: And they serve that section and five in the Valley, is that not true?

MR. PAGE: They are not direct beneficiaries of the Central Valley Project. *They have rights of their own which we must recognize and which we must compensate them for.* (p. 429)

* * * * * *

MR. FITZPATRICK: On the other hand, if they took them into court, it might tie that project up for many, many years?

MR. PAGE: Yes. We had two alternatives in this regard, one of which was to go ahead regardless of those rights, and the other was to try to negotiate them.

MR. FITZPATRICK: And they might get out an injunction against you.

MR. PAGE: Yes; that was threatened and we were fearful to go ahead of it because of that. (p. 430)

F. Y. 1941

REPRESENTATIVE BUCK: * * * Now that water-right difficulties have been adjusted and work begun on major units * * * much more rapid progress can be made on construction. (p. 1066)

F. Y. 1947

REPRESENTATIVE J. LEROY JOHNSON: Under California law the water that the Friant Dam stores and the Friant-Kern Canal diverts, or some of it, rightfully and legally belongs to water users downstream from the Friant Dam along the San Joaquin River. They have a moral, and under the California law they have a legal, right to that water, just exactly the same as a man has a legal and vested right in his land. (p. 556)

REPRESENTATIVE GEARHART: * * * Every drop of water of the normal flow of San Joaquin River is in ownership. (p. 580)

F. Y. 1948

REPRESENTATIVE J. LEROY JOHNSON: * * * To replenish the water we have taken out there, which is the property right of irrigationists along the San Joaquin River and in the valley there, for use around Bakersfield, by taking water from the Sacramento River and putting it, down at Mendota, into the San Joaquin River. (p. 1329)

F. Y. 1949

MR. JENSEN: * * * The next item is "Water rights, $332,000." Tell us about it.

MR. BOKE [Regional Director]: * * * on the San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area of their water. * * * Part of that $332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area and we have settled with about 212 of them.

We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of the money will be used in settling those cases.

In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley. (pp. 1280-1281)

F. Y. 1950

REPRESENTATIVE THOMAS W. WERDEL: States that 1,000,000 acre feet of water used on grass lands had

been purchased from Miller & Lux for about $1,000,000. (pt. 2, p. 588)

REPRESENTATIVE LEROY JOHNSON: "• • • all of you know, that water in California is property. The water which we take out of the San Joaquin River must be replaced. (pt. 2, p. 593)